UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADREA, LLC,

Plaintiff,

v. 13 Cv. 4137 (JSR)

BARNES & NOBLE, INC., BARNESANDNOBLE.COM LLC, AND NOOK MEDIA LLC,

Defendants.

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October 21, 2014
10:05 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

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(Trial resumed; jury not present)

THE COURT: I will note for the record that I sent counsel this morning the final charge and the final verdict form. The only -- to be continued.

(Jury present)

CLIFFORD NEUMAN, resumed.

THE COURT: So, ladies and gentlemen, I apologize profusely. It was literally beyond my control. There are matters that unfortunately have to be handled sometimes, but it doesn't make it right for you, and I am really sorry that you had to sit around so far. But let's continue.

MR. CABRAL: Thank you, your Honor.

CROSS-EXAMINATION (Cont'd)

BY MR. CABRAL:

Q. Good morning, sir.

A. Good morning.

Q. Yesterday when we finished we were talking about the '501 patent. So if we can bring up claim 7 of the '501 patent.

Yesterday we were talking about the "storing an electronic book on a viewer" element, claim 7. Do you recall that?

A. I do recall that.

Q. And we spoke yesterday about several instances where the Saigh patent stated that the memory was separate from the control unit viewer. Do you recall that?

A. I do recall referring to that.
Q. I want to talk about a different element of the '501 patent and claim 7 specifically, and that's the next element that appears in the claim, the "associating a predetermined amount of time" element. Do you see that?
A. I do see that.
Q. You agree that the Court defined this term to mean associating with the electronic book for a predetermined amount of time that begins when the electronic is stored on the viewer. Do you agree?
A. I do agree.
Q. And your understanding of the Saigh patent is that the reference describes a preset time period that is transcribed into the memory module, is that right?
A. That is correct.
Q. Those memory modules are the Nintendo cartridges we talked about yesterday or the equivalent thereof?
A. They are writable, but yes, they are.
Q. The time period that is discussed in the Saigh patent, that's written into the memory of the memory modules at something called book bank facilities, is that right?
A. That is under one embodiment. There is a separate embodiment where they are written into the memory on the device through the controller where they are being copied from one of those compact cylinders.

Q. So if we could bring up the Saigh patent, column 7, from line 61 through 65.

This is Defense Exhibit 411. There is a copy in your binder if you would like to look at it as well.

A. I do have that one. It's actually quite small in print.

Q. Maybe on the screen we can blow it up a little bit. That will be line 61 through 65.

I want to direct your attention to the last four lines in the paragraph beginning with "the preset time." Do you see that?

A. I do see that.

Q. It says, "The preset time periods before automatic erasure of information programmed in the memory module may be set in the memory module from a book bank facility or from a compact cylinder." Do you see that?

A. I do see that.

Q. So you agree that the time period in the Saigh patent is written into the memory modules either at the book bank facility or from a compact cylinder, correct?

A. That is what is being stated there, yes.

Q. Now, isn't it your view that the Saigh patent describes a lending period that begins after the information is transcribed in the memory module?

A. Yes, that is what is described.

Q. Before we leave the lending patent, I just have a few more

questions, if that's OK.

Yesterday we talked about the amount of time it takes for a request sent from the Nook device to reach the Barnes & Noble server after a user accepts a loan offer. Do you recall that?

A. Well, after the user presses the button that indicates their acceptance.

Q. Exactly. Do you recall talking about the amount of time it takes for the request from the Nook device to reach a Barnes & Noble server?

A. I do recall.

Q. You mentioned that when the user presses the accept button on the Nook device, you said that request could be received in milliseconds, isn't that right?

A. Yes. When the user presses that button, that button press can be received within milliseconds, depending on various things, but it should not take very long.

Q. That's true no matter where the user is in the country, right? The same is true if the user is in California or New York City?

A. It would depend how good their network connection is.

Q. But assuming they had the same quality network connection, the amount of time it took for the Nook device to communicate with the Barnes & Noble server would be approximately the same regardless of the user's location in the country, is that

right?
A. Well, we could talk about physics and the speed of light, but that's small amounts of time so it would be similar.
Q. How do you know that?
A. From my understanding of computer networking.
Q. During your analysis in this case, you learned about Barnes & Noble's network of content distribution, is that right?
A. Akamai's content distribution network, yes.
Q. Did you also learn about Barnes & Noble's servers and networks?
A. I did learn about their servers and some of their networks, but not all of them.
Q. And Barnes & Noble has servers located in the United States, is that right?
A. They have some servers in the United States, yes.
Q. And those servers communicate with the Nook devices, is that right?
A. Nook devices do communicate with those servers.
Q. And these would be the same servers that communicate with the Nook devices as part of the lending operation, is that correct?
A. As part of the pressing of the accept button, yes, they would communicate with Barnes & Noble's servers.
Q. These would be the same servers that communicate with the Nook devices via the shop feature that we have discussed

throughout this case as well, correct?
A. I need to look if different ones were being used for different functionality, but both those do speak to Barnes & Noble's servers.
Q. Let's move on to the '703 patent. You discussed during your testimony yesterday a reference called Munyan. Do you recall that?
A. Yes, I do recall the Munyan reference.
MR. CABRAL: If we can bring up claim 1 of the '703 patent.
Q. You provided an opinion in this case that the Munyan reference renders claim 1 of the '703 patent invalid, right?
A. Yes, I did.
Q. I want to direct your attention to the step of claim 1 that refers to "based on a predetermined URL or an identifier associated with the consumer appliance." Do you see that?
A. I do see that.
Q. And that part of the claim refers back to the initiation of the retrieval of data that precedes in the claim, do you agree?
A. Yes, it does.
Q. Now, the consumer appliance, when we are referring to Munyan, that refers to the electronic book system in your opinion, is that right?
A. Sorry. Can you repeat that?
Q. The consumer appliance, with reference to the Munyan

patent, refers to the electronic book system in your opinion, is that correct?

A. Yes, it is.

Q. And your opinion is that by selecting the bookstore icon in Munyan, that initiates the retrieval of data as required by claim 1, is that correct?

A. Yes, that is correct.

Q. You agree that the electronic book system described in the Munyan reference does not have any predetermined URLs on it, correct?

A. Yes, it does not have predetermined URLs.

Q. So your opinions are based on the identifier as that term is used in claim 1, correct?

A. Yes, it is based on the identifier.

Q. Yesterday you testified that in your opinion the identifier in Munyan was a security identification code, correct?

A. That is correct.

Q. Now, let's turn to the Munyan patent at column 15, line 52. Specifically, lines 52 through 62.

Again, this is Defense Exhibit 471.

A. OK. I am referring to which lines?

Q. This is going to be column 15, line 52. We will bring it up on the screen.

Hold on one second. I want to make sure we have the right claim on the screen.

MR. CABRAL: We are on Defense Exhibit 471?

Q. Column 14, starting at line 52. There we go.

Starting at line 52, do you see the passage that begins with "the security circuit"?

A. I do see that passage.

Q. This is one very long sentence and I won't read you the whole thing.

A. But please let me read the whole thing.

Q. Go ahead. Just tell me when you're ready.

A. Yes, I have read through it.

Q. Do you agree that the security identification code, that is the basis of your opinion, with respect to the identifier element, is part of a security circuit in the Munyan reference?

A. Yes, it describes it as such.

Q. And you agree that the purpose of the security circuit and the security identification code is to discourage theft of the consumer appliance and to make sure that products can only be accessed by the consumer appliance that downloaded the information?

A. That is what is described there.

Q. Is it your opinion that in order to initiate retrieval of the data based on an identifier, that identifier must actually be used in initiating the retrieval of data, for example, by customizing the data retrieved by reference to the identifier?

A. The data that is retrieved must be dependent in some manner

on that identifier.
Q. And it's your view that the identifier must actually be used in the initiation of the retrieval of that data in order to satisfy the requirements of claim 1, correct?
A. That is correct.
Q. Now, isn't it correct that nothing in the Munyan patent suggests that the device actually uses the security identification code to customize the data returned to the consumer appliance?
A. I disagree.
Q. Isn't it correct that nothing in the Munyan reference suggests that the consumer appliance actually uses the security identification code to return product recommendations to the consumer appliance?
A. I disagree.
Q. What is the basis for your disagreement?
A. Well, we look at the final sentence of the passage that you have right up there: "The bookstore will terminate communications with a personal electronic book if said user identification code or said security identification code is invalid."

So what is happening is that the connection is being established to the bookstore. The bookstore is now checking what that code is. If the code is not valid, it is terminating the connection, basically returning nothing. And that is

different than what it returns, that is the list of items that are available for purchase, which occurs in the case that that connection is not terminated. That decision is made based on what that security identification code is.

Q. So is it clear that the basis for your disagreement is the last sentence of the paragraph starting at line 62 and ending on line 65?

A. That sentence and there were, I believe, similar sentences, but to the same extent elsewhere.

Q. So the security identification code is used to terminate communications with the bookstore if the code is found to be invalid, correct?

A. And the corollary to that is to allow communications with the bookstore when it is valid.

Q. But this doesn't say that the security identification code customizes the data returned to the personal electronic book, does it?

A. This does not explicitly state this.

Q. This doesn't say that the security identification code is specifically used to retrieve product recommendations for the personal electronic book, does it?

A. It is used in establishing the connection with the bookstore from which those product recommendations are retrieved. It is not able to retrieve those product recommendations if this identifier is incorrect.

Q. This doesn't say that the security identification code is used specifically to retrieve the product recommendations, does it?

A. Well, one of ordinary skill in the art understands that that is inherent in what is disclosed.

Q. But you agree it doesn't expressly say that, correct?

A. I agree it does not expressly say that.

Q. Let's turn to claim 13, if we can bring that up.

You provided some opinions yesterday, or some testimony I should say, regarding claim 13 and a reference called Bolas. Do you recall that?

A. I do recall that.

Q. The Bolas reference discusses -- I should say discusses an Internet radio, is that right?

A. Yes, it discusses an Internet radio.

Q. The Bolas reference doesn't discuss e-books or e-readers, right?

A. It does not discuss e-books or e-readers.

Q. I want to direct your attention to claim 13 and specifically the element "identifier representative of a type of the consumer appliance."

That's in the enabling, that middle clause there, three lines from the bottom.

Do you see that element in claim 13?

A. I do see that.

Q. Yesterday you testified that the serial number in Bolas was the identifier for the radio device, is that right?
A. I did discuss the serial number as being an identifier, yes.
Q. You testified also that the serial number in Bolas is not representative of a consumer appliance, isn't that right?
A. Yes, I did.
Q. So you would agree that the Bolas reference does not disclose every element of claim 13 of the '703 patent, right?
A. That, I believe, was a "to the extent that" argument, and we discussed that the identifier is used in the same manner that it is in the Nook devices. But if you did not apply that same understanding, then I was not arguing that this claim element would be met.
Q. So let's look at this issue in isolation without considering the Nook devices, is that fair?
A. It's your call. I will look at it how you want me to.
Q. You would agree that the Bolas reference does not disclose every element of claim 13 because the serial number is not representative of a consumer appliance, correct?
A. Under the scenario where we are not looking at that the same way that we looked at it for the Nook devices, yes, you are correct.
Q. So you agree that the Bolas reference does not anticipate claim 13 of the '703 patent, is that correct?

A. Again, to the extent that we are not looking at the claim language in the same way that we are for the Nook devices, yes, I would agree with that statement.

Q. Because claim 15 depends from claim 13, your conclusions would then be the same with respect to claim 15 as well, correct?

A. Yes, again with the same limitation. If we are not looking at the claim the same way or that element the same way that you are looking at it for the Nook device, then that would be so.

Q. You point to, for the content information about a context of using the radio, you point to the audio data and text information received by the device, correct?

A. I pointed to that information, but, in particular, the text information that is describing the audio is one of the things that constitutes that context of usage.

Q. So let's turn back to claim 13. We don't have to turn back because it's already up on the screen.

I want to direct your attention to the last element of claim 13, if we can, beginning with, "Based on the identifier, the server initiating access to a Web page with content information about a context of using the consumer appliance." Do you see that?

A. I do see that.

Q. Now, with that element in mind, I want to turn you back to the Bolas reference that is Defendants' Exhibit 477.

Specifically, column 6, line 52.

Are you there?

A. I see it on the screen.

Q. It says, "On the net radio station server side" -- and then in parentheses it says "a pseudo code" -- "the system will receive and act upon input from the user's Internet radio box as follows." Do you see that language.

A. I do see that language.

Q. Then what follows in the Bolas reference is the actual pseudo code referred to in that sentence we just read. Would you agree?

A. Yes. It starts on the bottom of column 6 and continues at the top of column 7.

Q. If we can bring that up on the screen here.

We are now looking at the pseudo code referred in the Bolas patent. Do you agree?

A. I do agree.

Q. Would you also agree that the serial number does not appear in this pseudo code which shows how the system receives and acts upon the radio device, does it?

A. You also need to look at the next text that follows that, but this particular piece of the pseudo code does not use that particular parameter.

The next paragraph that starts at column 7, line 20, talks about "the net radio station uses the tuning knob and

user parameters to index into a list of station URLs." Those user parameters are the two parameters referred to as user name and the serial number.

Q. So we will get to that next, I promise. I won't skip over it. Right now we are looking at the actual pseudo code referenced in the Bolas patent, correct?

A. Yes.

Q. You're not suggesting there is another pseudo code that is not up on the screen, right?

A. This is a piece of code. The entire code that would be implemented there would be a larger piece of code. But what is up on the screen, this is the only piece of pseudo code that's on the screen.

Q. This is the only pseudo code that was referenced in the preceding sentence in the Bolas patent that we just read, right?

A. Yes, that is the only piece of pseudo code that is referenced in the preceding sentence.

Q. And this pseudo code does not include a serial number, do you agree?

A. This particular piece of pseudo code does not include the serial number.

Q. Now, let's go back to that sentence we were just looking at, which is at column 6, starting at line 52. And here it says that the pseudo code that we just looked at shows how the

system will receive and act upon input from the user's Internet radio box. Would you agree?

A. I agree that it states that.

Q. And what we just looked at you agree does not contain a serial number, correct?

A. The particular piece of code that we just looked at did not contain a serial number.

Q. Let's look at what you just pointed out in column 7, starting at line 20.

I believe you referred to the first sentence here which reads: "The net radio station server uses the tuning knob and user parameters to index into a list of station URLs from which the radio audio data will be actually served." That's what you pointed to earlier, correct?

A. That is what I pointed to.

Q. Specifically, you were pointing to the words "user parameters," is that right?

A. I was pointing to the words "user parameters."

Q. In your opinion, you think the user parameters refer to the serial number, is that right?

A. I think it refers to the two parameters, one called user name and one called serial number.

Q. So the user name relates to the actual user, correct?

A. Yes.

Q. The serial number relates to the radio, correct?

A. The serial number relates to the radio, but the two together are part of the registration of the user with the radio.

Q. So your interpretation of this language is that the user parameters includes the serial number based on your review of Bolas, is that right?

A. Based on my review of Bolas. Based on the fact that it didn't use the specific, quote, user name parameter. It described two parameters there -- it described more than one parameter there. And you have one that is labeled user name, another one that is labeled serial number. And, by the way, the pseudo code that was just referred to did not include the user name one either.

MR. CABRAL: If we can get an instruction to have the witness limit his answer to the question.

THE COURT: Yes. Just answer the question, please.

Q. The content information about a context of users in Bolas, that refers to audio data and the accompanying text, correct?

A. That is correct, yes.

Q. Is it correct that the only thing you can point me to in the Bolas patent that suggests that the serial number plays a role in initiating retrieval of that data is this sentence that is highlighted on the screen?

A. This sentence or a similar sentence, but effectively this sentence, yes.

Q. I want to talk to you about the '851 patent very briefly.

MR. CABRAL: If we can bring up claim 96.

Q. I want to direct your attention to the (a2) element there: "Selects a title from the transmitted list of titles." Do you see that?

A. I do see that.

Q. That refers back to the receiver, which is element (a), correct?

A. Yes, that needs to be performed by the receiver.

Q. Yesterday you gave some testimony regarding a combination of something called a Sachs patent and another reference called S-HTTP. Do you recall that?

A. I do recall that.

Q. And your opinion is the combination of these references renders obvious claim 96 of the '851 patent, is that right?

A. That is correct.

Q. Yesterday you testified that the receiver in the Sachs patent does not actually select the title from a transmitted list of titles, isn't that right?

A. That was a "to the extent that" argument, but yes, that is correct.

Q. You also agree that the Sachs patent doesn't explicitly mention a receiver component at all, does it?

A. It did not explicitly mention that.

Q. S-HTTP is a protocol, is that right?

A. That is correct, S-HTTP is a protocol.
Q. And you agree that S-HTTP doesn't disclose hardware that constitutes receiver, correct?
A. It inherently runs on such hardware, but it does not specifically describe the hardware.
Q. So you agree that neither side of the combination, the Sachs patent or S-HTTP, discloses a receiver that selects a title from a transmitted list of titles, isn't that right?
A. It does not explicitly, but they do inherently disclose it.

Actually, let me be more correct. It inherently discloses a receiver, and as I stated in my direct testimony, it's only to the extent that the arguments are made with respect to the Nook and receiver. In other words, in those references, just as with the Nook devices, it's not the receiver that is -- sorry. I'm sorry. You said receiving a list of titles.

Q. Does your answer still apply?
A. My answer still applies without the caveat that I was describing.
Q. Your inherency reference, that relates to the S-HTTP reference, is that right?
A. That had to do with the selecting.
Q. That's right.
A. Yes.

(Continued on next page)

Q. That's right.
A. Yes.
Q. I want to finish at the place that we started, actually, on the issue of infringement, specifically, infringement with regard to the '851 patent. I want to go back -- we don't have to go back again. I should probably look at the screen before I say that. I want to direct your attention to the same element, "selects a title from a transmitted list of titles," that we have highlighted there. OK?
A. OK.
Q. You don't disagree that when a user of a Nook device purchases a book, the Nook devices send a request containing the EAN for the purchased book to the Barnes & Noble cloud, correct?
A. I do not dispute that.
Q. You don't dispute that while the user ultimately chooses which book to purchase, the device selects and communicates the EAN associated with the purchased book to the Barnes & Noble cloud, right?
A. I did not state that it selects. It is communicating that selection.
Q. You agree that the device communicates the AEN associated with the purchased book to the cloud, correct?
A. Yes, I do agree with that.
Q. You didn't perform any independent analysis to confirm

whether the Nook devices receive a transmitted list of EANs, correct?

A. I did not do any additional or any independent analysis for that.

Q. But you reviewed the results of Mr. Berg's man-in-the-middle analysis to see if you could find any lists of EANs received by the Nook devices, is that right?

A. I did review his analysis with respect to that.

MR. CABRAL: Your Honor, I have a few more questions here. If I may, I would like to show the witness a document.

THE COURT: All right.

MR. CABRAL: May I approach, your Honor?

THE COURT: Yes.

Q. I handed you a document marked for identification as Plaintiff's Exhibit 73.001. This is an excerpt of data from a file identified as Plaintiff's Exhibit 73, which is a file that ends in extension CHLS. My question to you, sir, is do you recognize this document identified as Plaintiff's Exhibit 73.001 as data from Mr. Berg's man-in-the-middle analysis?

A. That is what I believe it to be.

MR. CABRAL: Your Honor, plaintiffs offer Plaintiff's Exhibit 73.001 into evidence.

MR. SHARIFAHMADIAN: No objection.

THE COURT: Received.

(Plaintiff's Exhibit 73.001 received in evidence)

Q. You reviewed Mr. Berg's man-in-the-middle data when forming your opinions regarding whether the Nook devices select an EAN from a list of EANs, correct?

A. Yes, I did.

Q. I would like to direct your attention to page 2 of this document. That would be at the bottom of PTX-073.002. Do you see the line what looks like exactly what is here on the screen that begins with a script type? Do you see that?

A. I do see the script type, yes.

Q. That line ends with the word "datatorender," do you see that?

A. I do see that.

Q. The next line begins "EANs," do you see that?

A. I do see that as well.

Q. What follows in this document is a list of EANs corresponding to books with the next EAN appearing on page 3, lines 4 through 5, do you agree? Maybe we can bring that up to help you answer that question.

A. I do see a list of EANs. I had a tool that helped me go through this when I viewed it originally.

Q. The document that we marked or entered into evidence as Plaintiff's Exhibit 73.001, you agree that this document shows a list of EANs, correct?

A. Yes, where you are pointing to it shows a list of EANs.

Q. This list of EANs would have been communicated between the Nook device and the Barnes & Noble server, correct?
A. I believe this list of EANs would have been communicated from the Barnes & Noble server to the Nook devices.
Q. Now let's talk about, this is the last issue I have here --
A. Or to the Nook device. Sorry.
Q. Let's talk for one minute about the secure SSL TLS channel that you discussed yesterday. OK?
A. OK.
Q. Do you agree that during the purchase operation the Nook devices create a secure SSL TLS channel with a Barnes & Noble server, is that right?
A. That is correct.
Q. You agree that during the purchase operation the Nook devices also create a secure SSL TLS channel with the server hosted by Barnes & Noble's content provider, Akamai, correct?
A. Not necessarily during the purchase. That would be established during the subsequent download of the content.
Q. Fair point. At some point the Nook device establishes a secure SSL TLS connection with Akamai to download the book to the viewer, correct?
A. That is correct.
Q. You don't dispute that the information sent over the secure SSL TLS channels is encrypted, do you?
A. It is encrypted.

Q. You don't dispute that secure SSL TLS channels allow for anything sent through those channels to be encrypted, do you?
A. They allow for anything that is sent through them to be encrypted, yes.
MR. CABRAL: Your Honor, with that, I have no further questions.
THE COURT: All right. Redirect.
REDIRECT EXAMINATION
BY MR. SHARIFAHMADIAN:
Q. Good morning, Dr. Neuman.
A. Good morning.
Q. I'll start with where counsel left off, the '851 patent, and actually the SSL. We had the discussion yesterday about different types of encryption that there are?
A. Yes, we have.
Q. Is it your opinion that SSL type encryption is a different type of encryption that happens with the Barnes & Noble books themselves?
A. Yes, it is.
Q. One is transient, the other one is persistent?
A. One is transient and one is persistent, that is correct.
Q. Barnes & Noble's books are encrypted in a persistent manner using ACS4?
A. Yes, Barnes & Noble books are encrypt in a persistent manner.

Q. When are Barnes & Noble's books encrypted?
A. They are encrypted during the ingestion process.
Q. Are they ever encrypted at any other time?
A. They are not encrypted at any other time. With respect to the discussion that we had before, the encrypted book itself is subsequently later reencrypted through that transient stream, the one that is with the Akamai server; but that is not reencryption of the book, because what is being encrypted on that stream is different, it is the encrypted book.
Q. Counsel asked you if it is your opinion that it is obvious to combine the SoftBook patent with S-HTTP. Do you recall that?
A. I do recall that.
Q. In your opinion, why is it obvious to combine them?
A. Because S-HTTP was a protocol that was being placed on the standards track, much as SSL was. There were libraries that were available to do this. And it was common in that time period that when you had software systems that required encryption, to try to use things that were used across a range of applications rather than reinventing your own purchase.
Q. There was also a discussion regarding the SoftBook patent.
MR. CABRAL: I object, your Honor. I apologize. I was distracted. I move to strike the last answer as outside the scope of the testimony.
MR. SHARIFAHMADIAN: Counsel opened the door, your

Honor.

MR. CABRAL: Not regarding motivation to buy. To be clear, your Honor, it is outside the scope of the expert report.

THE COURT: I wish you had raised this before the answer was given. The first sentence of the answer will stand and the rest will be stricken. That will be difficult for the jury to follow, but that is your problem. But that is the ruling of the Court.

MR. CABRAL: Understood, your Honor. Thank you.

BY MR. SHARIFAHMADIAN:

Q. Does the SoftBook patent inherently disclose a receiver?

A. Yes, it does.

Q. Is S-HTTP inherently intended to run on a device with a receiver?

A. Yes, it is.

Q. Did Mr. Berg's man-in-the-middle analysis show anything regarding what actually happens to the list of EANs that counsel pointed to in PTX-073.001?

A. It did not show what occurs on the device.

Q. Now let's turn to the '703 patent and let's start with claim 13. Can we have that up, please. Claim 13 is directed to a method of enabling the service provider to provide -- it refers to consumer appliance, do you see that, in the preamble?

A. I do see that.

Q. Is claim 13 limited to ebooks and ereaders?
A. No, it is not, in fact. The patent describes other kinds of devices.
Q. Is Bolas a consumer appliance under the Court's construction?
A. Yes, it is.
Q. Let me be more clear. Is the Internet radio disclosed in the Bolas patent a consumer appliance under the Court's construction?
A. Yes, it is.
Q. There was a question about let's take the claims in isolation and let's just look at validity. Do you recall that discussion?
A. I do recall that discussion.
Q. Is it proper to look at claims just in isolation?
MR. CABRAL: Objection, your Honor.
THE COURT: Sustained.
Q. Can we go to the Bolas patent itself. It's Defense Exhibit 477. Let's go to column 6 at the bottom. Towards the bottom, please. That's good. That last sentence that says "on the net radio station server side, this is pseudocode," this is the first time we are hearing that term. We have heard "source code," which is what again?
A. Source code is the human-readable form of instructions that describes the steps that are followed by a software/hardware

system.
Q. It is actually what the processor does, right?
A. It is converted automatically into what the processor actually does.
Q. What source code indicates actually happens?
A. Yes, what source code indicates actually happens.
Q. Pseudocode is called pseudocode because it is not actually source code, right?
A. It's not the actual source code that is used.
Q. Let's turn to claim 1 of the '703 patent. Yesterday you were asked a series of questions regarding that and you were asked specifically, "Do you agree that the requests sent by the Nook device after the user selects the shop icon results in the retrieval of data that is ultimately rendered and displayed on the Nook device?" You answered, "I agree with you." Do you recall that?
A. I do recall that.
Q. When the user selects the shop icon, which application within the Nook device is actually doing the retrieval of data?
A. It is the shop application itself.
Q. Which application is doing the rendering and displaying of the data that is retrieved?
A. It is the shop application.
Q. We were also asked, "You don't dispute that the user initiates the retrieval of the content information about a

context of using the Nook devices by selecting the shop icon on the menu bar of the device?" Do you recall that?

A. I do recall that.

Q. You answered, "I do not dispute that it is initiated by selecting that icon." Do you recall that answer?

A. I do recall that answer.

Q. When the shop icon is selected, what is it that the user is accessing?

A. The user is accessing the shop application, which is a web browser.

Q. In your opinion, can the initiating of retrieval of data happen without the user accessing the shop application?

A. Not through the shop application.

Q. Let's turn to claim 13 of the '703 patent. Yesterday there was a series of questions regarding the single-user input limitation in this claim. Do you recall that?

A. I do recall that.

Q. You testified that there are a series of steps and inputs that must be first performed before the user can press the shop icon and initiate the retrieval of data, is that generally accurate?

A. Yes, that is generally accurate.

Q. You were specifically asked, "If you performed all of the precursor steps and did not press the shop icon, isn't it correct that you wouldn't retrieve content information by a

context of usage"? Do you recall that question?
A. I do recall that question.
Q. You answered, "As we understand that claim, you're correct." Do you recall that?
A. I do recall that.
Q. Let me ask you this. What if you took a Nook out of the box and you did none of the precursor steps that you had discussed and all you did was press the shop icon. Could you in that case initiate retrieval of data from a server?
MR. CABRAL: Objection, your Honor.
THE COURT: Ground?
MR. CABRAL: At this point form and foundation.
THE COURT: Overruled.
MR. CABRAL: Thank you, your Honor.
A. First of all, without doing those precursor steps, you would not have been able to reach the shop icon. But secondly, even if you were able to reach the shop icon and press it, because the device was not configured, you would not have been retrieving the contents of usage.
Q. In fact, pressing the shop icon without the precursor steps doesn't retrieve anything, and performing the precursor steps without pressing the shop icon also doesn't perform anything, isn't that right?
THE COURT: Sustained: Compound, leading, argumentative, rhetorical. Shall I go on?

Q. Sir, is it your opinion that the precursor steps and the pressing of the shop icon must be considered together when determining whether the single-user input limitation is met?
A. Yes, I must.
Q. Can we turn to the '501 patent, and specifically can we bring up the Saigh publication, which we were discussing yesterday. That's Defense Exhibit 416. If I understand you correctly, you have testified that there is an embodiment within Saigh where books that are stored on a cylinder, compact cylinder, are transferred directly to the memory module that is in the control unit, is that right?
A. That is correct.
Q. There is a discussion of that on page 5, if we can bring that up. Look at lines 19 through 31. That second sentence says, "By operating the manual controls of the control unit of the personal library apparatus, information encoded on the compact cylinder is transferred either directly to the control unit and displayed as alphanumeric text and graphics on the control unit LCD, or portions of the information encoded object the compact cylinder are transferred to a memory module communicating with the control unit and stored therein." Do you see that?
A. I do see that.
Q. That is for later retrieval and display by the control unit, right?

A. That is correct.

Q. So, information can go from the compact cylinder to the memory module when it is in the control unit?

MR. CABRAL: Objection, your Honor: Leading.

THE COURT: Not as excessively as previously, but it is leading. Sustained.

Q. Let's take a look at page 14, please. Let's blow up lines 6 through 25, please. There was a discussion about this passage on page 14 yesterday, right?

A. That is correct.

Q. Is this the passage you were pointing to with respect to your opinions that Saigh discloses a predetermined amount of time for access to the device?

A. This is the paragraph that I was referring to when I was speaking to those opinions.

Q. This paragraph, the sentence is kind of long, but it says, "Information downloaded from a compact cylinder or from a book bank to a memory module 22 may also include date and time information as to when the data was transcribed into the memory module, as well as information regarding a set time period after which the information transcribed in the memory module will be automatically erased." Do you see that, sir?

A. I see that, and I pointed to that yesterday.

Q. When you reviewed Saigh, you were reviewing it from the perspective of a person of ordinary skill in the art, is that

right?

MR. CABRAL: Objection, your Honor: Leading.

A. I --

THE COURT: There is an objection.

It is, but I think that one is OK. I'll allow it, to move things along. You may answer.

A. Yes, I reviewed it from the perspective of one of ordinary skill in the art.

Q. Applying that perspective, sir, does this passage tell you anything about when the time begins?

A. Yes, it does. In fact, it specifically says, "date and time information as to when the data was transcribed into the memory module."

Q. When it was transcribed into the memory module?

A. Yes, and that is telling you when the period begins.

Q. It doesn't say after?

MR. CABRAL: Objection, your Honor: Leading.

THE COURT: Sustained.

Q. There was a series of questions yesterday also about the limitation in the '501 patent of associating a predetermined amount of time after the electronic book is stored on the viewer with the electronic book. Do you recall that?

A. I do recall that.

Q. The Court has actually construed that. If we can have the construction up, please. The construction is "associating with

the electronic book a predetermined amount of time that begins when the electronic book is stored on the viewer." Do you see that?

A. I do see that.

Q. The claim doesn't refer to 14 days, does it?

A. The claim itself does not refer to 14 days.

Q. It's just a predetermined amount of time?

A. That is correct, it just says a predetermined amount of time.

Q. You were asked whether it is your opinion that a few seconds constitutes a substantial difference of a lending period that lasts 14 days, and you answered, "It does not constitute a substantial difference in the life of the period." Do you recall that, sir?

A. I do recall that.

Q. In your opinion, does that question have any relevance to whether the associating element of claims 7 and 18 as it has been construed by the Court is literally met by the lending feature?

MR. CABRAL: Objection, your Honor.

THE COURT: Sustained.

Q. What, if any, relevance does that question have to your opinion regarding whether the associating limitation of claims 7 and 18 is met?

MR. CABRAL: Objection, your Honor.

THE COURT: Sustained.

Q. In your opinion, does the manner in which Lend Me works literally meet the associating limitation of claims 7 and 18?

A. No, it does not literally meet that.

Q. What about whether there is a substantial difference? Is there a substantial difference?

MR. CABRAL: Objection, your Honor: Asked and answered.

THE COURT: I'll allow it.

A. There is a significant difference in the way that it is done.

Q. Let me ask you this. When you are analyzing whether there is a difference, in your opinion what should the person of ordinary skill in the art look to? Should they look at the difference in the way that an account-based lending system and a device-based lending system work or should they look to the difference between three seconds and 14 days?

MR. CABRAL: Objection, your Honor: Compound and leading.

THE COURT: The first part of the question was so good, if only you had just stopped there, which was: When a person skilled in the art is analyzing this, in your opinion what should the person of ordinary skill in the art look to? I will allow that question.

MR. SHARIFAHMADIAN: As stated by your Honor, it's a

perfect question. Thank you.

A. As stated by his Honor, one should look to the actual variables that are being used, the actual meanings of the values. One should look at whether the time is the time at which the loan acceptance was processed by the server, and that is one thing. Or one should look at, again, the description of the value, whether it is the time when the book is stored on the viewer. That's a different thing.

One isn't looking at the actual meanings of those -- isn't looking at the actual numbers that fill into those values, because those numbers may sometimes be close to one another, they may sometimes be further apart from one another. So it is important to look at what the meanings of the values are that you are looking at.

Q. Thank you. Yesterday you were asked about the fact that the Saigh patent, not the publication, appears on the cover page of the patent-in-suit, do you recall that?

A. I do recall that.

Q. Did you review the file history of the '501 patent in formulating your opinions?

A. Yes, I did review the file history of the '501 patent.

Q. In your review of the file history of the '501 patent, did you see any indication one way or the other as to whether the patent office actually substantively considered and analyzed the '501 patent -- the Saigh patent?

MR. CABRAL: I object, your Honor.

THE COURT: Ground?

MR. CABRAL: Foundation to the extent the patent office considered the reference.

THE COURT: Overruled. You may answer.

A. I actually did a search through the file history, and yes, those were big. I had it in electronic form. I did an OCR so I could actually search it, looking to see where the Saigh publication, both Saigh as a name as well as the number of the patents, were referenced. I did see it referenced in the list that was presented. Well, I did this long before yesterday. I did see it in that list, but I did not see it discussed at all within the file history beyond being mentioned in that list.

Q. You mentioned a list. What are you referring to?

A. The list of the publications that the patent office indicated were considered.

Q. Do you have an understanding of who submitted that list, if anybody?

A. My understanding is that near the end of the prosecution of that patent there was a list with about roughly 700 or so publications that was provided to the patent office. I believe that that is where that list came from. Actually, more precisely, that that is where the items, some of the items on that list came from.

Q. Thank you. What was actually mentioned on that list? Was

it the Saigh patent or the Saigh publication?
A. It was the Saigh patent.
Q. Not the publication?
A. It was not the publication.
Q. On direct examination yesterday you provided your opinions that the Saigh publication discloses each and every limitation of the asserted claims of the '501 patent. Do you recall that, sir?
A. I do recall that.
Q. During cross-examination you were asked about whether the memory modules of Saigh are separate, do you recall that?
A. I do recall that.
Q. You were shown a series of quotes from the Saigh patent and asked to confirm that the word "separate" appeared on the page, do you recall that?
A. I do recall that.
Q. To be clear, does it remain your opinion that one of ordinary skill in the art reviewing the Saigh publication would understand it to disclose embodiments in which the memory module is part of the viewer?
MR. CABRAL: Objection, your Honor: Leading.
THE COURT: I think this is foundational to what is the next question that is going to be put. If that's correct, I'll allow it. Otherwise, not. Are you going to ask him a follow-up question, like why, or are you just leaving it as is?

MR. SHARIFAHMADIAN: I'm going to ask why, your Honor.

THE COURT: Then I will allow the question.

Q. Why does that remain your opinion, sir?

A. That remains my opinion because the Saigh publication actually describes how these components are used together. In fact, there is a description that describes the memory module as an integral component of the controller in one of the ways that it is used.

Q. From what perspective did you analyze the Saigh patent?

A. I analyzed the Saigh patent, as with everything else, from the perspective of one of ordinary skill in the art.

Q. Can we put up the Saigh publication, please. And can we go to page 6 and a description of figure 4. If we could also put up figure 4 next to it. Can you blow up the description of figure 4, please.

MR. CABRAL: Your Honor, I would object as outside the scope of the cross-examination, as this figure was not discussed.

THE COURT: No, I'll allow it. You may have recross on that if you wish.

MR. CABRAL: Thank you, your Honor.

Q. That's a description of figure 4. Figure 4 is a block diagram showing the interrelationship between functional elements of the control unit of the electronic personal library apparatus. Do you see that, sir?

A. I do see that.
Q. Can you describe what you are seeing here on figure 4, please.
A. Figure 4, as just described as being a block diagram, it is showing what those functional elements are. In this we see the interface. We see in particular of relevance here the memory module that is being shown as one of the functional elements. You see the keypad, the LCD display. It is really the inclusion of the memory module as one of the functional elements that I focused on in understanding the Saigh publication to disclose those elements interconnected in such a manner.
Q. Let's turn to page 10 of Saigh, please. Let's focus on lines 25 through the end. Did you also review this section of the Saigh publication in forming your opinions?
A. Yes, I did.
Q. It says, "A plug-in interface between the reader control unit 20 and the memory module 22 of the type having plug and jack connections is provided on a side of the control unit housing 36." Do you see that?
A. I do see that.
Q. Skipping the second sentence, the third sentence says, "The slotted recess enables insertion of the memory modules 22 in to the slot and connection of mating plug connectors of the memory modules with the plug connectors of the control unit, thereby

connecting the inserted memory module in communication with the microprocessor of the control unit." Do you see that, sir?

A. I do see that.

Q. How did this passage inform your opinion with respect to whether the Saigh publication discloses a device with memory?

A. This basically told me that the memory modules, actually as I described them yesterday, are inserted into the control unit much as you insert an SD card or, as was described by the other side, a Nintendo module. This is describing that kind of insertion.

Q. Now let's take a look at page 13, please, lines 25 through 33. This section says, "Information stored in the memory module 22 is retrievable by the control unit 20 for display by the control unit on the LCD screen 48." Do you see that?

A. I do see that.

Q. It goes on to say that, "The memory module is programmed by insertion of the module into the recessed slot 82 of the control unit." Do you see that?

A. I do see that.

Q. Then, "By operating the control unit keypad 50 to download information from a compact cylinder inserted in the cylinder reader module 28 to the memory module 22 inserted in the control unit 20." Do you see that?

A. I do see that.

Q. How did this passage inform your opinion with respect to

whether Saigh discloses a viewer with a memory on which books can be stored?

A. This was actually the basis for my understanding of the embodiment which I have described earlier, that is, where you are doing the copying from the compact cylinder through the control unit into the memory module, which is part of the apparatus, part of the viewer.

Q. The accused Nook devices have an SD memory slot, correct?

A. At least some of them do, yes.

Q. Some of them do, yes. Basically, you can insert an SD memory card into it and it's a form of memory, right?

A. That is correct.

Q. Is that similar to the memory that is disclosed in the Saigh reference?

A. Yes, it is.

Q. In reviewing Mr. Berg's infringement analysis that he provided in his report in this case, do you recall whether he addressed the SD memory cards and the SD memory slots in the Nook devices?

MR. CABRAL: Objection, your Honor: Outside the scope of cross-examination.

THE COURT: I wonder. Actually, come to the side bar on this.

(Continued on next page)

(At the side bar)

THE COURT: This does seem to be going well beyond the scope.

MR. SHARIFAHMADIAN: Your Honor, the suggestion in cross-examination is that removal from memory is not a part of the device and should not be considered as part of the device. That is directly contrary to the position that Mr. Berg took in his expert report. That's all we want to point out.

THE COURT: I think that is something you can point out on summation. I don't think that is appropriate for redirect on this witness. The objection is overruled.

How much longer do you have on redirect?

MR. SHARIFAHMADIAN: I will take a look at my notes, but I may be done but no more than a few minutes.

MR. CABRAL: Your Honor, did you say overruled or sustained?

THE COURT: Did I say overruled? I'm sorry. Sustained. The objection is sustained. Sorry. Thank you very much. You flip a coin, sometimes it comes up heads and sometimes tails.

MR. CABRAL: Thank you, your Honor.

(Continued on next page)

(In open court)

MR. SHARIFAHMADIAN: Pass the witness.

THE COURT: Anything else?

MR. CABRAL: Your Honor, just a few questions.

RECROSS-EXAMINATION

BY MR. CABRAL:

Q. Professor Neuman, you were asked by defense counsel about the Saigh patent and its consideration by the patent office, do you recall that?

A. I do recall that.

Q. You referred to a list of materials shown within the prosecution history of the '501 patent, is that right?

A. That is correct.

MR. CABRAL: Your Honor, with your permission, I would like to hand the witness a document.

THE COURT: OK.

Q. Could we actually bring it up on the screen. It is Joint Exhibit 5, which has been admitted into evidence. I'm referring specifically to the page on the bottom right corner ending in 58798. If we could highlight the top block there. There we go. Do you see under the big letters "Information Disclosure Statement By Applicant" there is reference to examiner initials? Do you see that?

A. I do see that.

MR. SHARIFAHMADIAN: Objection, your Honor.

THE COURT: Ground?

MR. SHARIFAHMADIAN: The exhibit is incomplete.

THE COURT: I'm sorry?

MR. SHARIFAHMADIAN: The exhibit is incomplete.

MR. CABRAL: Your Honor, I am trying to avoid the hand-up of a 500-page --

MR. SHARIFAHMADIAN: It is a 28-page document, your Honor.

THE COURT: The entire exhibit will be received, since it is a joint exhibit and already has been admitted, in fact. If you want to show him some other page, you may.

MR. SHARIFAHMADIAN: Thank you.

BY MR. CABRAL:

Q. Is this the list of materials that you were referring to, Professor Neuman?

A. This is part of that list of materials, yes.

Q. Under "examiner initials" do you see the letters TT?

A. I do see that.

Q. If we can go down to the bottom of the page, there is an examiner's signature there and the name Tamara Teslovich. Do you see that?

A. I do see that.

Q. Do you understand that to be the name of the patent examiner who examined the application leading to the '501 patent in this case?

A. Yes, I do.
Q. If you look six references up from the bottom of that list, that shows the Saigh patent there, doesn't it?
A. Yes, it does.
Q. If we go to the top, do you see -- you agree that the examiner's initials, scroll down this whole page, has an indication that the examiner considered the references listed on this page, correct?
A. I do see that.
Q. During your redirect you testified that you saw no evidence that the Saigh patent was substantively considered by the patent office during the examination of the '501 patent, right?
A. Yes, that is correct.
Q. Isn't that because the patent office did not issue any rejections during the examination of the '501 patent based on the Saigh patent?
A. It is because I did not see any discussion of the Saigh patent other than its inclusion in a list of publications as you have just shown here.
Q. Is it fair to say that the patent office didn't think that the Saigh patent was relevant enough to have any substantive discussion of that reference during the prosecution of the '501 patent?
A. I don't know what their thinking was particularly.
Q. Because you don't know what the patent office thought about

the Saigh reference, correct?
A. I only saw what they discussed or did not discuss about the Saigh reference in the file history.
Q. You only know that the patent office considered the Saigh patent during the examination process, though, right?
A. I see that they have listed it as considered, yes.
Q. Just a few more questions about the Saigh reference specifically. I want to direct your attention, and this is Defense Exhibit 411, to column 3, starting at line 47. Actually, line 44. Do you see there starting at line 44 it says, "brief description of the drawing figures"?
A. I do see that.
Q. Under that heading it says, "Further objects and features of the present invention are revealed in the following detailed description of the preferred embodiment of the invention and in the drawing figures wherein," and it proceeds down. Do you see that?
A. I do see that.
Q. Would you agree that all of the descriptions that follow of the drawings and figures relate to the same preferred embodiment referenced here in that sentence?
A. The sentence certainly indicates that they do where it says "of the preferred embodiment," yes.
Q. When you look down to figure 4, do you see the reference to figure 4 there?

A. I do see the reference to figure 4.
Q. The Saigh patent says that figure 4 is a block diagram showing the interrelationship between functional elements of the control unit of the electronic personal library apparatus, right?
A. Yes, I do see that.
Q. You are not suggesting that figure 4 is somehow a separate example other than apart from what is described elsewhere in the Saigh patent, are you?
A. No. I think that figure 4 is an example of what is described in the Saigh patent.
Q. Using our Nintendo example, OK?, it is not your position that the games stored on the Nintendo cartridge are actually stored on the Nintendo console, is it?
A. First of all, your Nintendo example is not a particularly good one, since it is read-only memory in those particular modules. But when one looks at a controller that has memory within it, whether it's an SD card, whether it's some other kind of memory card, one still thinks of that device, including that memory, as a device that encompasses all those components.
Q. That hurts. I thought my Nintendo example was pretty good, actually. But my point is the same. Isn't it correct that in the Saigh reference, in the context of the Saigh reference, the book is stored on the memory module and not on the control unit?

A. When the book is stored on the memory module, it is in the control unit in this particular embodiment.

Q. In what particular embodiment? There is only one preferred embodiment described here.

A. We see the figure where the memory module was an integral component. We saw the example that we had on the screen otherwise where it was being copied into the memory module. In those cases the memory module was inserted into the control unit.

Q. Is it your position that when the electronic book is stored on the memory module, it is stored on the control unit viewer?

A. Yes, it is my opinion that when it is stored, at least under that embodiment, it is stored on the viewer.

MR. CABRAL: No further questions.

THE COURT: Anything else?

MR. SHARIFAHMADIAN: Just brief redirect.

THE COURT: Go ahead.

MR. SHARIFAHMADIAN: I have to ask for plaintiff's cooperation to please put back up the JTX-005 that you had on the screen, please.

MR. CABRAL: Your Honor, could we approach very briefly?

THE COURT: All right.

(Continued on next page)

(At the side bar)

MR. CABRAL: I apologize for calling this, your Honor. The issue has been beaten to death. If the argument is going to be that the patent office somehow was overwhelmed by the amount of material they considered, we consider that to be an irrelevant point and prejudicial for purposes of admitting that kind of evidence in this case.

THE COURT: I don't know what he is going to ask. I was amazed that when you asked the witness about what's gone on in the patent office, there was no objection on the grounds of hearsay, which it clearly blatantly is, as well as speculation. But since there was no objection, you sort of opened that door. We'll see what the questions are. I think that door was opened.

MR. CABRAL: Thank you, your Honor.

(Continued on next page)

(In open court)

FURTHER REDIRECT EXAMINATION

BY MR. SHARIFAHMADIAN:

Q. Can we blow up the top left corner. Thank you. Counsel handed you this sheet of paper and asked about the Saigh reference mentioned on there. Do you recall that?

A. Yes, I recall that.

Q. Do you see at the top left there it says sheet 9 of 28?

A. Yes, I do see it says sheet 9 of 28.

Q. I am going to hand you a different portion of the JTX-005 and ask that that be blown up. It is actually in your binder at JTX-005 excerpt.

A. I have it here.

Q. Can we see the top left again. That says sheet 1 of 28, right?

A. Yes.

Q. Do you have all 28 pages there, sir?

A. Yes, I have all 28 pages.

Q. That was what was submitted to the patent office, right?

A. That was my understanding.

MR. CABRAL: Objection, your Honor: Foundation.

THE COURT: Overruled.

Q. Did you actually take the time to -- are you aware of how many references are listed in this document that were submitted at one time?

A. My understanding is it's approximately 700.

MR. SHARIFAHMADIAN: Thank you.

THE COURT: Anything else?

MR. CABRAL: No, your Honor.

THE COURT: Thank you very much. You may step down.

(Witness excused)

THE COURT: Ladies and gentlemen, we will give you a 15-minute break at this time.

(Jury not present)

THE COURT: Counsel, I am going to take a short other matter now.

(Recess)

(Continued on next page)

(Jury not present)

THE COURT: Who is the next witness?

MS. ARNI: The next witness is Shawn Ambwani by a video deposition.

THE COURT: Who is the next live witness?

MR. EDERER: We have Mr. Barnes.

THE COURT: Why don't we get him on the stand now.

MR. EDERER: Before the jury comes in, may I raise one issue?

THE COURT: Yes.

MR. EDERER: One of the things that we may be asking Mr. Barnes about is the calculation that he did with respect to the later starting dates. Yesterday we had a discussion in connection with the jury instructions about whether or not you were going to instruct the jury on this issue of marking and when the starting date was.

THE COURT: As you can see from my draft, I am not convinced there is anything in here that warrants anything about marking, but that's why I want to hear from Mr. Barnes. If he has some evidentiary support for anything having to do with marking, then I may adjust my instruction. If he doesn't, he doesn't.

MR. EDERER: He was going to present a calculation from a different starting point.

THE COURT: It seems to me, and I do not want to spend

more than two minutes discussing this now because, through no fault of your own, we are running late today, but -- I will give you an opportunity to discuss it later -- I don't recall, counsel can correct me if I am wrong, any evidence in this case yet about devices being marked. Is there any such evidence?

MR. CABRAL: There is none, your Honor. And there is also no evidence that 287 applies in this case.

THE COURT: If there is no evidence of anything being marked, then an expert can't be talking about something not in evidence, unless it fits under 703, and I don't think this does. So then we are down to the pure question of whether the damages in this case, with respect to the two patents that the parties disagree as to when the damages go from, date from the date of infringement back several years or from the date of notice. And that's the one question I wanted to hear counsel talk about, but I think marking is not part of this case.

MR. EDERER: We can address the issue later.

THE COURT: Very good. Let's bring in the jury.

(Continued on next page)

(Jury present)

THE COURT: Please call your next witness.

MR. EDERER: Defendants call Ned Barnes, your Honor.

NED BARNES,

called as a witness by the defendants,

having been duly sworn, testified as follows:

THE DEPUTY CLERK: State your name and spell your last name slowly for the record.

THE WITNESS: My name is Ned Barnes, B-A-R-N-E-S.

DIRECT EXAMINATION

BY MR. EDERER:

Q. Mr. Barnes, would you please briefly describe your educational background?

A. Yes. I received a degree in accounting from George Mason University in 1991. I have been a licensed certified public accountant since 1993. I am also a certified fraud examiner. And I have been practicing professionally as a forensic accountant and economic consultant for approximately the last 18 years.

Q. Where are you currently employed?

A. I am currently employed with the Berkeley Research Group. We go by the acronym BRG.

Q. What is the Berkeley Research Group?

A. BRG is an economic and financial consulting firm.

Q. What do you do at the Berkeley Research Group?

A. I provide consulting services to clients on a variety of issues, but a significant portion of my practice is devoted to the valuation of intellectual property and related issues.

Q. Does this include assessing damages for alleged patent infringement?

A. Yes, it does, on many occasions.

Q. Have you also analyzed issues relating to patent valuation outside of litigation?

A. Oh, yes. On many occasions I have been retained to perform a valuation of patents or patent portfolios outside of the context of litigation. I have also been retained on occasion to play a consulting role in connection with ongoing or prospective licensing activities.

Q. Have you ever been qualified as a damages expert in any litigation?

A. Yes, I have.

Q. In patents litigations?

A. Yes, I have.

Q. Were you retained by Barnes & Noble to provide assistance in this litigation?

A. I was.

Q. What were you asked to do?

A. I was asked to analyze the appropriate -- the royalty rates that would be appropriate in this matter for the three ADREA patents, assuming that the jury were to conclude that any one

of the three or all three were found to be valid and infringed by Barnes & Noble.

Q. Were you able to make any assessment as to whether Barnes & Noble actually infringed any of the patents at issue in this case?

A. No, I was not. That's outside the scope of my work.

Q. So you're not offering any opinions on infringement or validity, are you?

A. That's correct. I'm not.

Q. If the jury finds that there is no infringement, would there be any damages?

A. No, there would not be.

Q. So what were your conclusions regarding the royalty rate that you calculated?

A. I concluded that an appropriate royalty rate for the '851 patent and the '501 patent together would be eight cents per unit; for the '501 patent alone, four cents per unit; and for the '703 patent, two cents per unit.

Q. Now, why did you do a calculation for each of the three patents separately?

A. Several reasons. First of all, each of the three patents correspond, as I understand it, to different functionality. So that would be a factor in having a separate royalty for each of the three patents. But it's also important to recognize that the three patents at issue have significantly disparate

expiration dates. So the hypothetical license that would be in effect for any of the patents is going to vary patent by patent.

Q. Did you prepare a report reflecting your conclusions?

A. I did.

Q. When was that report prepared?

A. My initial report was prepared at the end of last year, late December 2013.

Q. Did you ever revise or supplement your report?

A. Yes. I provided a supplementation, a supplemental report, in August of this year.

Q. Why did you do that?

A. A couple of reasons. There was a need to update some of my calculations for the passage of time, and I also accounted for a limitation to the damages period for the '851 patent.

Q. What do you mean by a limitation for the damages period for the '851 patent?

A. It is my understanding the damages are only available for the '851 patent for the eight-and-a-half month period, March 29, 2012, through December 9, 2012.

Q. And what is the December 9, 2012 date, what is the significance of that date?

A. That's the date that the '851 patent expired.

Q. Now, can you explain how you went about your damages analysis in your report?

A. Sure. I began with a consideration of the Georgia-Pacific factors, which provides a framework for investigating and analyzing issues that would be relevant to determining the outcome of a hypothetical negotiation.

Q. What is the purpose of using the Georgia-Pacific factors for an analysis like the one you conducted?

A. Well, again, it provides sort of a checklist for various economic and factual considerations that can be useful in conducting this type of analysis.

Q. Did you look at all of the Georgia-Pacific factors?

A. Well, I certainly considered them all. There's 15 of them, and they are not all going to be equally relevant or appropriate in every situation, but I considered them all. I focused on the factors that I believe were most relevant to the analysis here.

Q. What were the factors that you considered to be the most relevant here?

A. I think we have got a slide. There are five or six.

MR. EDERER: Your Honor, we have a few slides for Mr. Barnes.

Q. What are we looking at here, Mr. Barnes?

A. This is a slide that -- these are not specifically the factors; these correspond to several of the factors.

So, for example, the first one: Were the patents ever licensed? That was the first factor that I believe was

particularly relevant here.

Q. We will go through each of these considerations in a minute, but I first wanted to ask you a few questions about the hypothetical negotiation that you referred to earlier.

Now, who is that hypothetical negotiation between?

A. The hypothetical negotiation is going to be between Barnes & Noble as the licensee and as the licensor Discovery with respect to the '851 patent and the '501 patent and Philips with respect to the '703 patent.

Q. What time period did you use for this hypothetical negotiation?

A. November 2009, late 2009.

Q. Why did you choose that date?

A. Well, the hypothetical negotiation, it's designed to occur in the time leading up to when the alleged first infringement began. The alleged first infringement began in this case when Barnes & Noble introduced its first Nook product, which was I believe December of 2009. So I used the month before that as the time period for the hypothetical negotiation.

Q. You mentioned that the hypothetical negotiation would have been between Barnes & Noble and Discovery, on the one hand, for the '851 and '501 patents, and between Barnes & Noble and Philips, on the other hand, with respect to the '703 patent, correct?

A. That is correct.

Q. Why didn't you use ADREA in the hypothetical negotiation?
A. Well, in 2009 ADREA didn't exist, ADREA hadn't been formed yet, and the patents were actually owned at that time separately by Discovery and Philips.
Q. So in your analysis did you consider this to be two separate negotiations?
A. There would, in effect, be two separate negotiations because you have two independent owners of the patent assets at issue.
Q. What is the scope of the license that would result from the hypothetical negotiation that you analyzed?
A. I believe the scope would have been a nonexclusive license.
Q. Why is that?
A. Well, the evidence that I reviewed indicates that both Discovery and Philips were interested in broadly licensing their patent portfolios. I am not aware of any information to suggest that either one of those parties was ever interested in identifying one single potential licensee to whom they would grant an exclusive license. And that's consistent with what ADREA did once they were formed and acquired the patent assets.
Q. What effect would a nonexclusive license have upon a royalty rate that you're calculating for the hypothetical negotiation?
A. Well, on a comparative basis, nonexclusive versus exclusive, a nonexclusive license is going to have a lower

royalty rate because it is going to provide lower value.
Q. What about the geographical scope of the hypothetical license? What did you look at there?
A. My understanding is the geographic scope of the license from the hypothetical would be a U.S. only license, that's the only rights that are be conveyed in the hypothetical negotiation.
Q. What effect would a geographical scope that covers only the U.S. have on a hypothetical royalty rate that you're analyzing?
A. Again, as compared to a worldwide license, a U.S. only license is going to tend to have a downward influence on the rates.
MR. EDERER: Can you put the relevant consideration slide back up, please?
Q. Now, Mr. Barnes, going back to your list of your most relevant economic considerations, the first consideration you list up here is whether the patents have ever been licensed. Do you see that?
A. I do.
Q. What did you conclude with respect to that?
A. Yes. There was a license, and it was one royalty bearing license that had been entered into that included a license to these patents, and that was the license agreement that ADREA entered into with Amazon.
Q. Now, how did the Amazon license figure into --

THE COURT: When was that?

THE WITNESS: That was in 2011.

Q. How did the Amazon license figure into your analysis of the hypothetical negotiation?

A. Well, as an empiricist and a valuation professional, the best definition, the best information of fair market value is the amount that unrelated parties agreed to in an arm's-length exchange, which is what the Amazon license with ADREA was.

So I believe that the Amazon agreement -- that the economic turns of the Amazon agreement provide strong evidence as to the valuation of a license that would likely result from a hypothetical negotiation, and I use that as a starting point in my analysis, subject to further investigation.

Q. What do you mean by starting point?

A. Well, I went on from -- after analyzing the Amazon agreement, I investigated a number of other factors that might influence my consideration of the Amazon agreement either up or down.

Q. Is the Amazon agreement comparable to the agreement coming from the hypothetical negotiations that you analyzed?

A. Well, I believe in many respects it is. For example, Amazon and Barnes & Noble as licensees are direct competitors, at least with respect to the accused products, e-readers and tablets that can function as e-readers, although it's important to recognize that Amazon is a much, much bigger market

participant in this arena. And a second factor is that the way that the patents are allegedly utilized in the accused products is similar between Amazon and its e-reader products and Barnes & Noble.

Q. Now, would you consider the Amazon agreement to be a perfect match with the hypothetical license that you analyzed between Barnes & Noble and Discovery and Barnes & Noble and Philips?

A. No, it's not a perfect match. There are some key distinguishing factors and characteristics that I think it is important to investigate and analyze.

Q. Now, you calculated a per unit royalty rate from the Amazon agreement, correct?

A. I did.

Q. Did you just use that rate that you calculated from the Amazon license to stick it into your hypothetical license negotiation?

A. No, I wouldn't agree with that. I considered a number of economic and factual considerations that I investigated in arriving at the rate that I believe would be the product of a hypothetical negotiation.

Q. You just responded to the judge's question about when the Amazon license was entered into and you said 2011, correct?

A. I did.

Q. Do you remember approximately when in 2011 that license was

entered into?

A. It was right near the end, I want to say November 2011.

Q. How does a license agreement negotiated in late 2011 tell us about the value of a license that would have been negotiated late in 2009?

A. Well, Mr. Ederer, if you think about it, let me give you an analogy. If I asked you to investigate or try and estimate the value of a house five years ago, I say go look back and figure out what the house was worth five years ago. And you go out and you dig up all the public records and you find out there was an actual transaction involving this house, it was actually sold three years ago. Well, the information concerning the purchase price that was agreed to between a willing buyer and a willing seller is going to be an important data point for you to consider in evaluating what the house might have been worth five years ago.

Now, you're not going to stop there. You're going to want to do further investigation and determine, for example, were there major changes in the real estate market in that time, were there significant changes in the neighborhood where the house was. There are things that you want to investigate, but you're not going to discard the data point simply because --

THE COURT: What did you do in this case?

THE WITNESS: What I did in this case is I identified

a number of factors that I thought might distinguish the Amazon agreement from the hypothetical negotiation, and I investigated each of them.

THE COURT: What was the royalty rate in the Amazon agreement?

THE WITNESS: It was in the form of a lump sum. So the first thing I did was convert it to a per unit rate.

THE COURT: What was the rate you converted it to?

THE WITNESS: Eight cents per unit for the '851 patent and the '501 patent together, four cents for the '501 patent by itself, and two cents for the '703 patent.

THE COURT: OK. What did you do next?

THE WITNESS: So the first issue that I considered was the market conditions surrounding the Amazon agreement versus what the market conditions would have been at the hypothetical negotiation.

THE COURT: Let me ask you, leaping ahead for a moment, what was the final rate you came up with?

THE WITNESS: Well, I ultimately concluded that it was conservative to not make an adjustment. The evidence I reviewed I believe convinced me, if anything, the rates coming out of the hypothetical negotiation would have been lower than the rates from the Amazon agreement. So to be conservative I did not make a downward adjustment.

THE COURT: So you wound up using the same rates?

THE WITNESS: I did, your Honor.

THE COURT: Go ahead, counsel.

BY MR. EDERER:

Q. How did you go from the lump sum payments that were made in the Amazon agreement to a per unit royalty rate as you just described?

A. I had to convert them to a per unit by taking into account actual and estimated sales that I believe ADREA and Amazon would have considered when they entered into that agreement.

Q. Why did you convert these payments to a per unit rate?

A. Well, I believe it's the best way really to account for the significant size difference between Amazon and Barnes & Noble and the fact that Amazon sales of licensed products were much, much greater than Barnes & Noble sales of licensed products.

Q. So what is the relevance of the actual amount of money paid by Amazon to ADREA?

A. I think it's only relevant in the context of the number of sales, actual and expected sales.

Q. Now, what years of Amazon sales did you look at?

A. I looked at historical sales that covered the period 2008 through 2011.

Q. What data did you use to determine Amazon sales for the years 2008 to 2011?

A. I utilized actual Amazon -- actual sales data from Amazon's own business records.

Q. For what period of time?
A. For 2008, 2009, and 2010. And then there were partial year estimates for 2011.
Q. Did you use anything else in connection with your analysis of data of Amazon sales for the year 2011?
A. Yes. In order to get a better handle on 2011 full year sales, I collected information or I obtained information from a market research firm called IDC, which is in the business of analyzing various markets and putting that type of data together. So I obtained that information for 2011.
MR. EDERER: Can we put up DDX 1008, please?
Q. Now, we have a slide, Mr. Barnes. What are we looking at here?
A. Well, this is the sales data that we were just discussing for 2008, which is when Amazon first introduced its Kindle products, through 2011.
Q. According to this table, the estimated actual sales for 2011 that you used reflected a pretty big jump over the previous year. Do you see that?
A. I do.
Q. Did you do anything to test the reliability of the IDC data that you used as estimated actual sales for 2011?
A. Yes, I did. As I mentioned previously, I did have from Amazon's own records estimates.
MR. BAUER: Objection. Outside the scope.

THE COURT: I need a copy of his report. Reports I should say.

MR. BAUER: Your Honor, I am going to withdraw the objection, not because it's not outside the scope, but we will deal with it later.

THE COURT: You may answer the question.

A. Yes, I did. As I mentioned earlier, there was information in the Amazon records that I reviewed that had estimates for partial year 2011. And those estimates, I believe they were in the range of 18 to 24 million units for 2011. So that led me to conclude that the actual data, the estimated actual data that I obtained from IDC was reasonably accurate.

Q. Did you have any understanding as to what accounted for this jump in sales?

A. Yes. In addition to just the trend, the Kindle devices became more and more popular and successful over the time period, at the end of 2011 Amazon introduced a new product called the Kindle Fire tablet. And that product was very heavily promoted and it was very well received in the market. And although it was introduced near the end of 2011, there were substantial sales of that product in just the last quarter of 2011, which accounted for a significant portion of that increase.

Q. Now, you said that your per unit royalty calculation for the Amazon agreement also covered projected sales for the years

2012 to 2016, correct?

A. It did include projections, yes.

Q. What did you do to account for those sales?

A. Well, what I did is I wanted to put myself in the position of Amazon and ADREA when they entered into this license. So I tried to ascertain or obtain information that would have been relevant to those parties when they entered into the negotiation. I wanted to put myself in their shoes so to speak.

Q. So how did you determine the projected Amazon sales that ADREA and Amazon would have considered back in 2011?

A. Well, I did some research, and I collected information on market forecasts from around that time, around the end of 2011 and the beginning of 2012, that would reflect I believe market data or market intelligence that would have been available to the parties when they entered into this agreement.

Q. What forecasts are you referring to?

A. These would have come from articles, industry magazines, other types of forecasts that would have been generally available in the public domain.

Q. These are forecasts that would have been available to ADREA and Amazon at the end of 2011, is that right?

A. Reasonably so, yes.

Q. How do you know ADREA and Amazon would have considered this information in 2011?

MR. BAUER: Objection. Foundation.

THE COURT: Overruled.

You may answer.

A. As a valuation matter, it really just makes sense that the parties would have considered contemporaneous information that would have been available at the time. I don't think there is any reason to not expect that they would have done that. But more directly, I found information in ADREA's own files, which indicate that this is the very type of analysis that ADREA itself was doing in connection with its license negotiations with Amazon; this is precisely what ADREA was doing.

Q. What information did you review in ADREA's own files?

A. I reviewed information where they had compiled projections of Amazon sales going out from 2012 to 2016. I didn't have access to the details of those projections, they were not provided to me, but I did have information to confirm that they in fact did make the projections.

Q. Why did you just go to 2016?

A. Well, several reasons. One is when I did my own investigation, the market research that I was able to find from that time period generally included forecasts or market projections that went out to 2016. So that's what the market was doing so to speak. But, in addition, that's also consistent with the information that I identified in ADREA's records as to how far out they were taking their projections.

Q. What projections did you actually use for the period 2012 to 2016, what did you conclude with respect to that?
A. The information that I found supported a growth rate, a year-by-year growth rate of in the neighborhood of 20 to 30 percent. But I chose to dial that back a little bit, and I utilized a growth rate of 10 percent per year.
Q. Why did you do that?
A. Just to be conservative.
Q. When you did your analysis at the end of 2013 for this case, wouldn't there have been data available for actual Amazon sales for 2012 and at least part of 2013?
A. Oh, sure. That information would have been available years later, but that's not information that would have been available to the parties when they enter into this agreement, and that's really what I am trying to focus on, is I am trying to understand the economic substance of the parties when they enter into this agreement, what were they thinking at the time.
Q. Do you know how Amazon's actual sales for 2012 and 2013 compared to the projections for those years that you used?
A. Yes. The actual data was -- the actual sales were quite a bit lower.
Q. Now, we have discussed how you have calculated Amazon sales. Can you explain again why you're even doing this calculation?
A. Well, again, I want to come up with a per unit rate from

the Amazon agreement, it being the only arm's-length fair market value license that involves these patents, and I want to use that as a starting point to conduct further analysis to determine if an adjustment is warranted in evaluating the outcome of the hypothetical negotiation.

Q. How did you calculate that per unit royalty rate?

A. Well, effectively, what I did is I took the payments that were prescribed in the Amazon agreement, the lump sum payments, and I divided them or I apportioned them out over all of the Amazon sales, both actual through 2011 and what I forecasted through 2016.

There is one additional wrinkle there, and that had to do with any time you're dealing with projections you have to account for a discount factor. A discount factor, when you're dealing with projections, is a way that we account for essentially two things. The first is whenever you're dealing with projections you have uncertainty and you have risk. Projections are not actuals. They can vary to some degree and you want to account for that. So you incorporate a discount rate.

The other reason why we have a discount rate is to simply account for the time value of money. Generally, as a economic matter, a dollar today is worth more than a dollar a year from now. You have got inflation. You have got time value of money issues. So we want to take into account those

two factors by applying a discount rate to the projections.

So accounting for that, what I did was I apportioned the lump sum payments in the Amazon agreement to the units that I had compiled for both actual and forecasted Amazon units.

Q. How did you spread out the actual payments that were made in Amazon among the patents in suit?

A. Well, when I did the -- so let's talk about the Discovery portfolio first. I calculated that the payments that Amazon made for access to the Discovery portfolio would have been equated to approximately eight cents per unit. That eight cents per unit covers all of the Discovery portfolio, not just the two patents at issue here. And I understand there were, I think, a dozen more U.S. patents, not to mention patent applications and foreign patents and so forth. But, again, to be conservative, I applied 100 percent of that value, of that eight cent per unit, to the two Discovery patents at issue here, the '851 and '501.

Q. What did you conclude with respect to those two patents?

A. Again, eight cents per unit.

Q. Did you also calculate a separate royalty rate for the '501 patent alone?

A. Yes. Four cents per unit.

Q. How did you determine that?

A. In the same manner.

Q. Did you also calculate a per unit royalty rate for the '703

patent?
A. I did.
Q. What was that?
A. That was two cents per unit.
Q. Did you similarly ascribe the entire value of the payment to that particular patent?
A. Yes. The '703 patent was part of the Philips portfolio. And when I did the analysis for the payment that Amazon made for the Philips and Sony portfolios combined, there were I believe over 40 patents, 40 U.S. patents, plus patent applications and foreign patent assets. And that would really -- those were the rights that would be associated with the two cents per unit. But what I did, again, to be conservative, is I assigned all of that value to just the '703 patent.
Q. Why is that being conservative?
A. Because I am not giving any credit, any value at least, for any of the other patents that were included in the Amazon agreement, but that are not related to the hypothetical negotiation here.
Q. So did you think that these per unit royalty rates that you calculated were fair?
A. Yes, I believe they are fair.
Q. Once you calculated a per unit royalty rate from the Amazon agreement, did you have everything you needed to know what the

rate would have been two years earlier at the hypothetical negotiations?

A. No. As I mentioned, that was my starting point. I got my starting point, my per unit rate, and now I want to undertake additional analysis, additional investigation to determine if there are any adjustments that need to be made to those rates.

Q. Did you make such an analysis?

A. I did.

Q. How did your consideration of these differences or adjustments affect your analysis?

A. Well, I identified four considerations, in particular, some of them would tend to cause me to believe that the rates of the hypothetical would be lower, some would cause me to believe that the rates of the hypothetical would be slightly higher.

Q. We have a slide here, which is DDX 1011. Do you see that?

A. I do.

Q. Did you prepare this slide?

A. It was prepared at my direction, yes.

Q. What are we seeing here on this slide?

A. Well, these are really the four, what I call the considerations, the distinguishing considerations between the Amazon agreement, where I got my starting point, and the circumstances surrounding the hypothetical negotiation. So this is what I am trying to investigate to determine if an adjustment is warranted.

Q. Would you take us through the slide and explain what the differences were and how they affected your analysis?

A. OK. So starting at the top, the first one is market conditions. We talked earlier about the house example, things could be different three years ago than five years ago.

So when I look at market conditions, I focus first on what were the conditions surrounding the Amazon negotiation, or the Amazon license. And at that time, Amazon was the market leader in e-readers. They had a market share of over 50 percent in that market. They had very successful e-reader products. The Kindle was a very successful product. They had just released, as I mentioned earlier, a new tablet product that was very well received in the market. So the economic consideration surrounding the Amazon agreement was very favorable.

So I contrasted that with, OK, what about in 2009 at the hypothetical negotiation where it's with Barnes & Noble? And in 2009, at the end of the 2009, Barnes & Noble had not yet introduced a product yet. They were introducing the Nook for the first time. So there is a significant degree of risk associated with whether or not these products are going to be successful. That, I believe, is a very significant distinguishing factor between the market conditions of the two negotiations that I believe would have had a significant downward effect on the royalty rate going from the Amazon

agreement to the hypothetical negotiation.

Q. What was the next difference that you identify?

A. The next difference has to do with the scope of the agreements. We have talked about this a little bit already.

The Amazon agreement, the Amazon license, included access to 14 patents in the Discovery portfolio, and I believe over 40 patents in the Sony and Philips portfolio, as well as a whole host of pending patents and foreign patent assets. That's quite different than the scope of the agreement at the hypothetical negotiation, which is a nonexclusive license to these three patents for U.S. rights only.

So, again, I believe that that would apply downward pressure to the rates going from the Amazon agreement to the hypothetical negotiation.

Q. The next difference you list here is legal considerations. Can you explain that?

A. Yes. In the context of the Amazon agreement, any agreement that is not part of a hypothetical negotiation, it's not uncommon for the party that's taking the license to, in effect, challenge whether or not they really need a license. They might challenge that the patents aren't valid or that the patents aren't infringed by their products. In fact, that's what Amazon did. In the negotiations with ADREA, Amazon took that position.

Now, Amazon ultimately agreed to pay a significant

amount of money to obtain a license, so it kind of offset in some ways, but that's a consideration that does not apply in the hypothetical negotiation. In the hypothetical negotiation, we have to assume -- it's kind of the rules -- we have to assume that both parties agree that the patents are valid and the patents are infringed. That's the assumption I make. Obviously, other people are going to argue about that, but that's the assumption I have to make.

And so when I am evaluating the difference between the Amazon agreement and the hypothetical negotiation, that causes some upward pressure on the rates that would come from the hypothetical negotiation.

(Continued on next page)

Q. The last difference you identify is a cross-license. Can you explain that.

A. Yes. Again, this is not unusual to see in some license agreements in the real world where, in connection with the negotiations for the Amazon license, Amazon actually provided what we call a grant-back or a license of their own patents to Discovery. Not to ADREA, to Discovery. That's not a consideration or a factor that would be relevant in the hypothetical negotiation. There is no consideration of a grant-back. So, all things being equal, that would tend to influence the rates slightly upward in the hypothetical negotiation as compared to the Amazon agreement.

Q. Overall, what is your opinion about the applicability of the Amazon agreement as it relates to the Barnes & Noble hypothetical negotiation license?

A. Again, I believe that it's very informative of the rates and the value proposition that would be considered and analyzed in the context of the hypothetical negotiation, particularly since it is the only actual agreement that we have that included these three patents.

Q. Did you adjust the Barnes & Noble rate in the hypothetical negotiation, the per-unit royalty rate, to reflect the overall upward or downward push on the Amazon rate?

A. No. I ultimately concluded, as I said earlier, that I believe the balance of these factors, the balance of these

factors informs me or tells me that the hypothetically negotiated rates would be somewhat lower than the Amazon agreement, than the rates in the Amazon agreement. But to be conservative, I did not make that adjustment, I just held the rates the same. I feel that is the conservative position.

Q. If we could go back and look at the relevant considerations slide again. I believe it's DDX-1007. Do you have that, Mr. Barnes?

A. I do.

Q. We have been talking so far about the first relevant consideration on this list, which is were the patents ever licensed.

A. Yes.

Q. Did you take into account these other four considerations that appear on the slide?

A. Yes, I did. Those were considerations that I also analyzed.

Q. Do these considerations correspond in one way or another with any of the Georgia-Pacific factors?

A. They do. Some apply to more than one of the Georgia-Pacific factors, but they certainly all stem from or relate to the Georgia-Pacific factors.

Q. Let's take the second consideration on your list, "Other attempts made to license the patents." Can you explain that, please.

A. Yes. One thing that I investigated was the extent to which there was an effort made by Discovery and Philips and then later ADREA to license these patents to any other parties. My conclusion on that was that yes, there were. Both Discovery and Philips prior to the formation of ADREA, and ADREA subsequently, undertook significant efforts to license these patents or at least license their patent portfolios which included these patents.

They were not successful in those efforts. They were unsuccessful in finding any other market participants who were willing to take a license and pay royalties for access to these patents.

Q. How did that affect your analysis of the per-unit royalty rate that you calculated?

A. That's going to have a downward influence on the rates because that is telling you that the market reality is that although ADREA, and Philips and Discovery before them, are out there trying to extend a license to these patents, no one is willing to take one, no one's interested in taking one.

Q. The next factor that we see up here is "Do the patent owners practice the patent?" Do you see that?

A. Yes.

Q. Can you explain your consideration of that factor.

A. Yes. This gets into an issue we often refer to as the commercial relationship of the parties. What I mean by that is

if you're in a situation where the licensor is in direct competition with the company that they are licensing the patents to, they are going to have a disincentive to grant that license because they are essentially going to be allowing a competitor to compete with them using their own technology.

Generally, what you see in those situations is the rates are higher. If I'm competing with you and we sell the same product, if I'm going to give you access to my technology, I'm going to command a premium on that license. That's quite different than if I have patents but I don't make products.

You make products, so I'm going to license to you the right to use my technology in your products. In that situation, all things being equal, it is going to have a downward influence in the rates because licensing my patents is the only way that I can obtain any return on them. I can't earn a return on them by making products myself; my only avenue is to license them.

Q. The next factor that is listed on the slide is "What would be the duration of the licenses?" Did you consider that factor?

A. I did.

Q. How did that factor impact your analysis?

A. Again, we talked about this earlier. Each of these three patents have different expiration dates. The '851 patent, as we mentioned, expired in 2012. The '501 patent expires next

year, in 2015. And the '703 patent going on, I believe, until 2026. So, the hypothetical license, the rights that are going to be provided by the hypothetical license, is going to vary quite a bit patent to patent.

As we talked about earlier, that's why I believe it is important to have a royalty rate that is tailored to each of the three patents, to take into account the significant differentiating factor in the duration of the three licenses.

Q. Did your royalty rate calculation do that?

A. Yes, it did.

Q. In what way?

A. As we talked about, I provided a specific rate for each of the three patents.

Q. The last relevant consideration on your slide is "Profitability of the products." Do you see that?

A. I do.

Q. We are talking about what products now?

A. Now we are talking about the products that would utilize the patents. These would be the Barnes & Noble accused Nook devices.

Q. Did you conduct any analysis with respect to that?

A. I did.

Q. What did you conclude?

A. First of all, at the time of the hypothetical negotiation --

MR. BAUER: Objection, your Honor. This is outside the scope, and relevance.

THE COURT: Let me see the reports and the relevant paragraphs.

MR. EDERER: Paragraphs 76 through 78, your Honor.

MR. BAUER: Your Honor --

THE COURT: Hang on a minute. Yes?

MR. EDERER: Your Honor, I would also mention paragraphs 39 through 41, which go to commercial success.

MR. BAUER: Your Honor, they are talking about the business unit, not the product.

THE COURT: Hang on a second. Overruled.

Q. Can you go ahead now, Mr. Barnes, and tell us your analysis of the profitability of the products and what you concluded.

A. Sure. As I mentioned earlier, in 2009, at the hypothetical negotiation, there are no products, they haven't released them yet, so there is no information on the profitability of the products at that time. However, subsequent to the hypothetical negotiation, we do have information on how Barnes & Noble's Nook business has performed. It has not been profitable. Since 2010 I believe Barnes & Noble's --

MR. BAUER: Your Honor, I will object and move to strike. The question was about products. He is talking about the business unit.

THE COURT: I understand that. You may cross-examine

about that. But that was the force of your objection, and the issue I whether the profitability of this expect of the Nook business is relevant in assessing the profitability of the product. The Court finds that that meets the modest threshold of relevance and was within the scope of the report. Overruled.

A. Since 2010 the available data to me indicate that Barnes & Noble's Nook business has suffered operating losses in excess of a billion dollars.

Q. Did you conduct any analysis with respect to the sales of the Nook products themselves?

A. Yes. The sales themselves of the Nook products individually, although Barnes & Noble does not maintain a separate profitability line on those products, but sales themselves have declined quite significantly since I think 2010.

Q. What information did you review in connection with the analysis that you just testified to?

A. The sales data, the unit sales data for Barnes & Noble came from Barnes & Noble sales records. My analysis of the profitability of the Nook business unit would have come from Barnes & Noble's annual reports, 10-Ks, that they filed with the Securities and Exchange Commission.

Q. If I can show you Defense Exhibit 339 for identification. Can you identify Defense Exhibit 339?

A. Yes. This is Barnes & Noble's annual form 10-K. It's required to be filed with the Securities and Exchange Commission. This particular one corresponds to the period that ends at the end of April 2013. That's the fiscal year end date for Barnes & Noble's business.

Q. Is this one of the 10-Ks that you reviewed in connection with your analysis of the profitability issue?

A. This is.

MR. EDERER: Your Honor, I move the admission of Defense Exhibit 339.

MR. BAUER: Objection.

THE COURT: Sustained. 403.

Q. In connection with your analysis of the profitability of the products, Mr. Barnes, what effect did this have on your royalty rate calculation?

A. Again, this is another consideration that I believe would have had a downward influence on the rates, the fact that in 2009 the products hadn't been introduced. But even subsequently declining sales, significant operating losses, those are going to be factors and considerations that are going to push down the rates.

Q. Looking at all the relevant considerations that appear on this chart, how did these all impact your royalty rate calculation in this case?

A. Again, these were all factors that I believe would have a

downward pressure on the rates. By not making a downward adjustment in the rates that I derived from the Amazon agreement, I believe my calculations have been very conservative.

Q. Let's talk about the damages calculations themselves, or the royalty rate calculations, if you will. Could you briefly explain how you actually came to those 8-cent, 4-cent, and 2-cent numbers before we go through this slide.

A. Sure. I think I already did that when I explained how I took the unit sales, both historical and projected, and I divided those into the total payments that were made under the Amazon agreement, accounting for the discount factor that I discussed earlier. Once I did that, I came up with the 8 cents for the Discovery portfolio, which again I attributed 100 percent to the '851 and the '501. When you multiply that 8 cents to the unit sales that were made by Barnes & Noble through June 30, 2014, you get a total damages figure of 569,306.

Q. That's for the '851 and '501 together, right?

A. That is.

Q. The starting point for this calculation is December 1, 2009, is that right?

A. It is. But remember the '851 is only -- the damages period for the '851 is only that 8½-month period from March 29, 2012, to December 9, 2012. All other periods in that date range at

the top there, the rate is only 4 cents. For those other periods, only the '501 would be included in the calculation.

Q. You did a calculation for the '501 only at 4 cents for the period indicated at the header of the slide, correct?

A. That's correct. For the entire period '501 only at 4 cents, it's $478,099.

Q. Then if you take the '501-only number and subtract it from the '851-'501 together number, what does that come out to?

A. The difference is approximately $91,000 for the '851 by itself.

Q. We see also some dates in parentheses next to the words "'851 only." Can you explain the significance of those dates.

A. Yes. Those are the same dates that I have been discussing earlier, March 29, 2012, to December 9, 2012. That's the 8½-month period for which damages may apply if the '851 patent is found to be valid and infringed.

Q. Then there is a number at the bottom of that slide for the '703 patent only. Do you see that?

A. Yes.

Q. Can you explain how you calculated that number.

A. That is for the entire date range at the top. That is all the units that were sold during that time period multiplied by the 2-cent royalty for the '703 patent.

Q. In your analysis, Mr. Barnes, are these the maximum amounts of damages that would be awardable for these three patents for

the period that you calculated them?
A. Yes. You would not want to add them all together, because there is some overlap between a couple of them, but yes.
Q. Explain that overlap.
A. If we took all three patents, for example, said all three are valid and infringed, then you would take the top line and the bottom line.
Q. The 569 and the 239?
A. Right. I think that is roughly $808,000.
Q. If you did the same thing with each patent by itself, the 478, the 91, and the 239, you would come out with that same $808,000 number?
A. That's correct.
MR. EDERER: No further questions, your Honor.
THE COURT: Cross-examination.
MR. BAUER: Thank you, your Honor.
CROSS-EXAMINATION
BY MR. BAUER:
Q. Hello, Mr. Barnes.
A. Hello.
Q. You spoke a lot about economics. You don't have any degree in economics, do you?
A. My degree is in accounting.
Q. Before you were retained here, you had no particular experience in the ereader space, correct?

A. I would not agree with that, no. I have analyzed other issues in the ereader space.
Q. For Amazon?
A. In a variety of contexts.
Q. For Amazon?
A. I have not ever specifically worked for Amazon, no.
Q. You have never actually negotiated a patent license with another party, have you?
A. I'm not a lawyer. I don't get involved in --
THE COURT: Just answer the question.
A. I haven't actually done a licensing transaction itself. I have consulted in that role.
Q. You have been paid how much so far for your work in this case?
A. My firm bills for my work in this case, and I believe total billings that my firm has invoiced to date are in the neighborhood of 175 to $200,000.
Q. This hypothetical negotiation would have taken place in late 2009, right?
A. That's correct.
Q. You said November 2009, right?
A. I think so, yes.
Q. That's when the Nook was first introduced?
A. Right around that time period. I don't have a precise date. I think it was late November-December.

Q. The Amazon Kindle had been on the market for two years by then, correct?

A. The Amazon Kindle had been on the market since 2008.

MR. BAUER: If I can get the ELMO working here, please.

Q. Let's capture some of these events so it will help us keep things in mind. The hypothetical negotiation would be late 2009, which is when the Nook was introduced. We can say the Nook introduced about here, right? (Indicating)

A. That would appear to be towards the end of December, but it looks close enough.

MR. EDERER: Your Honor, objection. This is misleading. We are at the beginning of 2009.

Q. We both made that mistake. I have an extra page. Late 2009 would be about here, right? (Indicating)

A. That looks more accurate.

Q. The Amazon Kindle came on the market in late 2008, correct?

A. I don't recall the specific time period in 2008. I want to say it might have been --

Q. Late 2007, I'm sorry. It was about two years earlier?

A. I don't have a specific date in mind. I know there were sales, significant sales, in 2008. I don't remember sales being reported in 2007.

Q. The negotiation would have taken place between Philips and Discovery on the one hand and Barnes & Noble on the other?

A. The hypothetical negotiation, yes.
Q. That's because Philips and Discovery owned the patents at issue here back in late 2009?
A. That is correct.
Q. In your view, whether Philips and Discovery were in the room together or negotiating separately would not have had any impact on the total amount negotiated, correct?
A. I think that the particular layout of the hypothetical conference room that the negotiation is taking place in is not something that went into my analysis. I believe there would have been two separate licenses coming from the hypothetical negotiation.
Q. But it wouldn't matter whether they were talking to each other or not at the time?
A. I don't think I made an assumption on that one way or the other.
Q. This hypothetical negotiation, it is at the same time as the Nook was introduced, right?
A. Right around the same time period, yes.
Q. Both parties are assumed to know all relevant business facts at that negotiation?
A. They are assumed to have equal access to information, yes.
Q. For that negotiation you considered historic information known to both parties, information that took place before 2009, right?

A. That would have been information that would have been known to both parties historically, yes.
Q. This is a strange thing, this hypothetical negotiation, which is a creature of law. It also allows you to consider post-2009 information, right?
A. It is a strange creature of law, I would agree with you on that. It does.
Q. But that is the law, that we need to look at what took place after as well, we don't disregard facts, correct?
MR. EDERER: Objection.
THE COURT: Sustained.
Q. As you understand your job, you look at facts that took place after 2009 and put them into this hypothetical, correct?
A. That is true.
Q. This is what is called in the field the "book of wisdom"?
A. I've heard that term used to describe it, yes.
Q. In fact, you use that term, don't you?
A. It wouldn't surprise me.
Q. What the book of wisdom tells us is that as an economic analysis, you don't limit yourselves or put blinders on and you look to see what actually took place in the future, right?
A. I think that's fair.
Q. Let's see what the parties to this negotiation would have known. They would have known Amazon had been on the market for two years already with its Kindle, right?

A. They would have known that, yes.
Q. The Kindle, you don't know if it was in late 2007, but it is somewhere around 2008 that the Kindle comes up, beginning of 2008, right? You know that?
A. My recollection is the early part of 2008. I apologize, I don't have a specific date.
Q. I'm not putting the exact date. We are just trying to get the order correct here. The parties would have known that Amazon was taking physical book sales away from Barnes & Noble bookstores over those two years?
A. The parties would be aware of the ongoing competition between Amazon and Barnes & Noble in I believe both physical books and electronic books.
Q. Barnes & Noble would have known that people were moving into reading digital books and that Barnes & Noble needed, as a book seller, to offer an option to their customers, right?
MR. EDERER: Objection.
THE COURT: Ground?
MR. EDERER: Compound.
THE COURT: It is, but I think it is a simple enough question. Overruled. Counsel, do keep in mind we are going to take our lunch break in about three minutes.
MR. BAUER: Any time that works for the Court, your Honor.
THE COURT: The time that works for the Court is 1

o'clock, three minutes.

A. I apologize. Would you repeat the question.

Q. At the time of the negotiation, the hypothetical negotiation, Barnes & Noble would have known that its customers were moving into reading digital books, correct?

A. I think the general environment in the market at that time would have been a consideration that would have been known by the parties, yes.

Q. And the parties would have known that Barnes & Noble needed, as a book seller, to offer an option to their customers so they could retain them as they moved to digital books?

A. That sounds reasonable. I'm not sure what you are referencing, but that doesn't sound unreasonable to me.

Q. Barnes & Noble would have already invested many tens of millions of dollars in the development of the product by the time the Nook had been introduced?

A. I don't have that information at my fingertips. I don't know one way or the other.

Q. You talked about the profitability of the business unit. You didn't look to see how profitable it was or how much they had spent to get the product on the market?

A. I don't recall at this point reviewing that information. It may have been something that was included that I considered. I don't recall right now.

Q. You must know that they spent tens of millions of dollars.

Not the exact amount, but to get this product on the market you don't think they spent tens of millions of dollars?
A. I just don't have that information handy. If you want to show me something, I'd be happy to look at it. I just don't recall right now.
Q. You testified about how much money they lost. I'm trying to understand what your basis is. Barnes & Noble enters this discussion in 2009 knowing that if they don't get a license, they cannot use that technology, right?
A. They enter the negotiation knowing that they want to take a license to these three patents. I'm not sure what you are referring to when you say "that technology."
Q. They enter into the negotiation on the assumption that they are infringing the three patents in this case, right?
A. That they would infringe with the sales of the accused Nook products, that's correct.
Q. You need to assume that the patents are valid going into that meeting, right?
A. That is correct, I make an assumption of validity.
Q. Going into that meeting, these Barnes & Noble people would know that if they couldn't get a license, they can't use the technology, because it is infringing valid patents, right?
A. The assumption is valid, infringed patents, and that both parties are willing and desire to enter into an agreement.
Q. And if they don't enter into that agreement, they can't use

the technology?
A. I don't think in the hypothetical negotiation that is an option.
Q. They have to take a license?
A. Both parties want a license in the hypothetical.
Q. All right. What we do know --
THE COURT: Let me ask you this. Is it not relevant for your analysis how badly someone wants a license?
THE WITNESS: I could see where that could be a relevant consideration. Depending on how significant a particular feature or component of the accused product might be, there might be a degree of magnitude there. That wouldn't be something that would -- that would be something that would be worth considering.
Q. You did no analysis in this case as to the value of any of the features, the patented features, correct?
A. I don't agree that that is true. I'm not a technical person, but I did review certain information on certainly the Lend Me feature, for example, which is accused of infringing the '501 patent, and the shop app, which is accused of infringing the '703 patent.
Q. We will get to that after lunch.
THE COURT: Actually, you hit the nail on the head. We are going to take our lunch break now and we will resume at 2 o'clock.

MR. BAUER: Thank you, your Honor.

(Jury not present)

THE COURT: Mr. Barnes, you can step down. During your cross you should not discuss the case with anyone.

THE WITNESS: Yes, your Honor.

(Witness not present)

THE COURT: With respect to the charge, let me ask plaintiffs first, are you going to be calling Mr. Wang or not?

MR. CABRAL: We do plan on calling Mr. Wang, your Honor.

THE COURT: Really? Why?

MR. CABRAL: Just for a brief rebuttal to some of the validity opinions.

THE COURT: Brief rebuttal to?

MR. CABRAL: To some of the validity opinions that were rendered by Dr. Neuman.

THE COURT: The only typo I found was on page 14. I'll fix it. It was "some meaning." It should have been "same meaning."

With respect to the one and only issue that I am going to hear argument on, the one and only issue I'm going to hear argument on, which is the last paragraph of instruction number 12 on compensatory damages and the related issue of marking, I'll start with the marking part. I still have not heard any evidence on the issue of marking. Unless someone from the

defense can tell me there is such evidence, we are not going to say one word in these instructions about marking.

MR. EDERER: Your Honor, are you asking me?

THE COURT: You're the defense last time I checked.

MR. EDERER: I'm sorry. I didn't hear you. The issue here, your Honor, is with respect to the issuance of the license, such as the Amazon license in this case. There was also a license issued to Sony. The issue is did the plaintiff demonstrate that there was marking and/or that if there was no need to mark because the product did not practice the patent.

The case law is clear that at this point in time if there is a license, such as the Amazon license, the burden goes to the plaintiff to demonstrate either that the product was marked or, if it wasn't marked, that the products did not practice the patent. That was the premise of the summary judgment motion in this case. That is the reason why your Honor ruled in favor of Barnes & Noble with respect to the '851 patent. You found that --

THE COURT: Excuse me. If you're right about that, then there is still no instruction on the issue of marking. My question to you was, was there any evidence of marking? With respect to marking, any evidence about that issue at all? The answer is there was none.

If you're right about the burden, then the instruction in the present way it reads follows. If you're wrong about the

burden, then we have to put a different date on. But neither way do we have to have any of this gobbledygook about marking.

MR. EDERER: Understood, your Honor.

THE COURT: Let me hear now from plaintiffs. What I understand defendant to be arguing is that because Amazon, after the settlement, had a license to utilize these patents and the marking section, what is it again --

MR. CABRAL: 287, your Honor.

THE COURT: Thank you. -- kicked in so that your damages, if there was no marking, would be from the time of actual notice, which was March 29, 2012. If they are wrong about that kicking in, then it is from the date of infringement, which is December 1, 2009 or two-thousand --

MR. CABRAL: 2009, your Honor.

THE COURT: 2009, yes. The only question now, we are down to one little issue, which is on the very last line of this: Should the date be March 29, 2012 or December 1, 2009? What is your argument as to why the statute did not kick in?

MR. CABRAL: Your Honor, what we are talking about here is a short window between November 2011, which is the execution of the Amazon license, and March 2012, which is the date of actual notice. You're talking about a four-month window here.

The litigation that Mr. Ederer referenced, that related to the '851 patent. Your Honor decided that issue on

summary judgment because the Amazon Kindle products were accused of infringing the '851 patent. So we couldn't very well argue that they were not patented articles in the sense as that term is used in section 287.

The lending patent, the '501 patent, is not accused in that case. The Kindle products were never accused of infringing the '501 patent. Our point of view, your Honor, and we cited some case law to this effect, is that there is no doubt that the plaintiff, the patent holder, has the ultimate burden of proving compliance with 287. But the defendant also bears some burden of identifying products that would be covered under the patents that would trigger the implication of 287.

THE COURT: OK, I understand that argument. Let me hear from defense.

MR. EDERER: Your Honor, I think it becomes a burden issue once again. At this point when there is a license, the burden is upon the plaintiff.

THE COURT: They are saying the license doesn't relate to these two other patents.

MR. EDERER: It certainly does. The license encompasses these two other patents. The license encompasses the entire portfolio of patents, which includes these other patents. And there has been testimony in this case --

THE COURT: If I understand what plaintiff is saying, the litigation against Amazon only accused them of violating --

MR. EDERER: The '851.

THE COURT: Yes, thank you.

MR. CABRAL: Yes, your Honor, the '851 and an unrelated patent as well.

THE COURT: They say that although as part of a settlement they got this agreement, a reasonable person in their position would not have believed that the '501 or '703 patents had been the subject of any accusation of infringement and therefore the marking section doesn't kick in, if I understand it. That is the argument, I think.

MR. EDERER: Right. That is not dispositive, your Honor. In fact, you denied summary judgment with respect to those other two patents because of the question whether Amazon and/or Sony, but let's focus on Amazon, was actually practicing those two patents and therefore needed those licenses notwithstanding the question of whether those licenses --

THE COURT: I understand the issue. I will decide it and let you know at 2 o'clock. Yes, you wanted to say something?

MR. CABRAL: Yes, your Honor. The only thing I would add is that the issue here is illustrated by the fact that had defendants identified any particular products that were covered by these patent during Discovery, which they did not do, we then could have come forward and shown why the patents or at least established why the patents didn't apply to those

products. The best example I can give your Honor --

THE COURT: We are cutting into your lunchtime as well as mine. I understand what you are saying.

MR. CABRAL: Thank you, your Honor.

THE COURT: How much longer do you have on cross?

MR. BAUER: Not more than an hour, your Honor.

THE COURT: How long are those two videotapes?

MR. EDERER: 38 minutes, I believe, total.

THE COURT: Together?

MS. ARNI: Yes.

THE COURT: Mr. Wang?

MR. BAUER: Not more than 45 minutes, your Honor. I would venture 30, but . . .

THE COURT: On the one hand, I'm thinking of letting the jury stay to 5:00. On the other hand, I'm not going to ask them to stay beyond 5:00. I don't like the situation, but you may collectively create the situation where we have someone's summation interrupted overnight and continue it next morning.

I don't blame counsel for the hour delay this morning. That was totally my fault. I was concerned by the I thought more than expected length of the redirect and recross, and so forth, of Mr. Neuman, but there it is. I don't say any of it was improper, it wasn't. Let's see how it goes this afternoon. We'll see you at 2 o'clock.

(Luncheon recess)

AFTERNOON SESSION

2:00 p.m.

(Jury not present)

THE COURT: So I adhere to the instructions in the fashion that I gave it to you, essentially adopting defendants' view of the issue. So I will ask my law clerk to hand each side the final instructions.

Let's bring in the jury.

MR. EDERER: May I raise one issue in light of your ruling?

THE COURT: Yes. You feel mortified that I ruled in your favor and you want to seek reargument?

MR. EDERER: No objection.

We were awaiting the results of the ruling. We did do a calculation from the date March 29 forward for all three patents, which we didn't present because we were awaiting the results of your ruling. So we would like to be able to conduct redirect with Barnes to ask him to provide that calculation.

THE COURT: All right. Let me hear from plaintiff.

MR. BAUER: My cross is based on the numbers that he has just done. What we would ask, because this is an issue of law, is that we just let the jury do it with the numbers they have, and you can correct it in posttrial briefing.

THE COURT: I think it would be aiding the jury to have this calculation. Here is what I think does make sense.

Assuming we are going to do all the things you folks told me about, I do not think it would be fair to plaintiff having to give a summation today, or even part of a summation today. I don't think that is fair. So we will have summations first thing tomorrow followed by the charge, and as a result of that, if you want to take a little bit more time or have a more lengthy recross after that comes out, I will certainly permit that. I am still going to hold the videotape to 38 minutes, but I think it would be not fair to, as I thought about it, the way it was probably going to work out, given everyone's timing, that plaintiff would sum up today and defendant would sum up tomorrow. I don't think that's really fair to the plaintiff, unless you want to do that. I can exclude that possibility if you want it, but it seems to me it wouldn't be equal treatment.

MR. BAUER: We were just going to ask your Honor what time we needed to finish. We didn't want to split the closing either, and I was going to ask your Honor what time I needed to be finished if you wanted to get the closing in today. But I am just not sure, if it's a 5:00 hard break --

THE COURT: I think where we are winding up, and I will apologize to the jury because it is totally my fault, is we will finish the evidence today. We will hear any motions anyone wants to make outside the presence of the jury. We will have summations at 9:00 tomorrow morning, followed immediately by the charge. They still will have the case by late morning

tomorrow.

OK. Let's bring in the jury.

Before defense counsel starts your redirect, I will explain to the jury that there is one portion of this that had to await a ruling by the Court so that both sides will know what is coming in.

(Jury present)

NED BARNES, resumed.

THE COURT: Counsel.

MR. BAUER: Thank you, your Honor.

BY MR. BAUER:

Q. All right, Mr. Barnes. We were talking about what the parties would know under this book of wisdom.

So they are doing the negotiation in late 2009. But as you said, we are not limited to the information they would have had in 2009, correct?

A. That is correct. We don't put blinders on it in a hypothetical negotiation.

Q. So in this respect, the parties would know that Amazon entered into an agreement with ADREA on November 10, 2011, right?

A. I think that the information concerning the agreement would certainly have been a relevant consideration.

Q. Let's just put that on here, November 10, 2011. That's the Amazon/ADREA agreement, and it's 11/10/11, right?

A. That looks close to right, yes.
Q. You agree that the Amazon agreement is the only comparable royalty bearing agreement that included a license to the patents?
A. Yes.
Q. You agree that the Amazon agreement is the most reliable evidence of the value of a license under the patents in this case, right?
A. I think properly considered, yes, it provides relevant information.
Q. In fact, I think you testified on direct it's the best information of a fair market value out there, right?
A. As a starting point to a complete analysis, I believe it is informative as to the fair market value of a license that would result from a hypothetical negotiation.
Q. That Amazon agreement was a lump sum agreement, right?
A. The form of the payment in that agreement was lump sum, yes.
Q. $12.5 million, right?
A. It was 10 million for the Discovery portfolio and the option, which was subsequently exercised, two-and-a-half million for the Philips and Sony portfolios.
Q. So Amazon paid 12.5 million for access to the Sony, Philips and Discovery patents, right?
A. Ultimately that's what they paid for access to the entire

portfolios, yes.

Q. And lump sum agreements are fairly typical, particularly as a way to settle litigation?

A. They are certainly not unheard of. I don't know what you mean by fairly typical.

Q. As a way to settle litigation, you know, you do this for a living, most litigations settle with a lump sum payment, don't they, that you have seen?

A. I don't know that I would agree with that. It's a case-by-case analysis. You would need to -- I couldn't make a generalization about that.

Q. I am not asking about the whole industry. Of the cases you have seen, where you have analyzed settlement agreements, lump sums are fairly typical, right?

A. I said it's not uncommon, but I have seen agreements that included a per unit.

Q. You have seen the Barnes & Noble agreements, the ones that they have produced in this case, right?

A. I have reviewed some Barnes & Noble agreements, yes.

Q. All the cases that they have settled relating to patents were lump sum payments, correct?

A. I recall some lump sum agreements. I don't recall every one of them, but I do recall some lump sum agreements.

Q. And a lump sum agreement, just so we have the right definition, is one in which the royalty is a single payment

that would cover essentially unlimited use of technology irrespective of volume, correct?

A. It would not be limited to a specific volume. It would account for -- any number of volume would be licensed under a lump sum arrangement.

Q. I will ask again. It's a single payment that would cover essentially unlimited use of technology irrespective of the volume of sales, correct?

A. I don't think I disagree with that.

Q. Now, there are advantages to the parties to enter into a lump sum payment, correct?

A. There are strategic differences that can be advantageous, disadvantageous. It would depend on specific facts.

Q. Typically the person taking the license, who takes a lump sum, typically prefers it because it caps its liability in case the product becomes more successful than anticipated, is that correct?

A. That's one potential advantage from a licensee standpoint.

Q. One potential advantage from the licensor's standpoint is a lump sum agreement gives them cash up front without risk of the marketplace tanking, correct?

A. That is one advantage from the perspective of a licensor, yes.

Q. Now, going back to the Amazon/ADREA agreement, that was a $12.5 million lump sum agreement, right?

A. Again, just to clarify, it was a $10 million payment for the Discovery portfolio and two and a half for the option for Philips and Sony.

Q. You agreed earlier they paid $12.5 million for the licenses they got, right?

A. Ultimately they did pay the full amount, they paid the full 12-1/2 million, but it was two separate payments.

Q. You have that $12.5 million payment to ADREA. You tried to convert that to a per unit royalty for your work in this case, right?

A. That is part of what I did, yes.

Q. To do that, to convert it, you needed to figure out the number of units to divide into that $12.5 million, right?

A. I had to figure out a number of units that I believe would have been considered, potentially considered by the parties at the time they entered into the agreement, yes.

Q. Now, in fact, between ADREA and Amazon, nobody exchanged any such unit calculations, right?

A. I don't know that to be the case.

Q. You haven't seen any evidence that either of them shared their expectations with the others about the future of the product?

A. I don't know that I could agree with that, no.

Q. You haven't seen any evidence that there was a negotiation between them on a per unit royalty basis?

A. Yes, I believe I have.
Q. What evidence did you see that they were negotiating a per unit royalty?
A. Well, a royalty on a per unit basis associated with a percentage of revenue.
Q. A percentage not per unit, right?
A. But it's per unit -- dollars per unit and percentage of revenue are both, in my vocabulary those would both be per unit.
Q. In this regard, from your calculations here, you were given actual sales data for Amazon for 2008, 2009 and 2010, right?
A. That is correct. And part-year estimates for 2011.
Q. Well, let's look at the data that you had to try to calculate the number of units to divide into that 12.5 million.

We can go to your source, but this was your document DDX 1008?
A. This is a slide that was prepared, yes.
Q. And under licensed units, that's the number of actual Amazon sales for those three years, 2008, 9 and 10?
A. Those two years are there, plus 2011, yes.
Q. I said 2008, 2009, 2010, that's three years.
A. I am just referring to the exhibit. But yes, the three years you referred to are on this exhibit, yes.
Q. Let's just see what the Amazon sales were.

For 2008, let's just do actual Amazon. For 2008,

actual sales are 366K, right?

A. That's right.

Q. For 2009, actual sales are 1.82 million, right?

A. That is correct.

Q. For 2010, actual sales are 5.3 million, right?

A. That's correct.

Q. And those are actual numbers?

A. Those were actual numbers.

Q. Right now I am just focusing on the actuals before we get into your projections and how you tried to figure things in the future. Let's just get accurate actuals.

You also had actual Barnes & Noble sales from 2009 to date, right?

A. I did have access to Barnes & Noble actual sales.

Q. Let's just look at Barnes & Noble's actual sales between -- the product was introduced in late 2009. There is just a residual number in 2009, a very small number of sales in 2009?

A. I don't recall what that number is. We would have to get it out.

Q. Let's pull up from your expert report Exhibit 4A. It's the top half of that.

MR. BAUER: Take it down for a minute. Your Honor, this hasn't been admitted in evidence.

Q. Sir, you submitted an expert report in this case?

MR. BAUER: Do we have the book to give him with his expert report?

THE COURT: Allow me to hand you your expert report.

THE WITNESS: Thank you, your Honor.

Q. That is your expert report, right?

THE COURT: You just want to get those figures from that one thing?

MR. BAUER: That's right.

THE COURT: Unless there is any objection from defendants, why don't we just have him read off those relevant figures.

MR. EDERER: That's fine, your Honor, although I do object to any attempt to admit or read from the expert report.

THE COURT: That's why I am doing it this way.

MR. EDERER: There is also an exhibit in the record that has those figures.

THE COURT: That's another reason why you have no objection.

MR. EDERER: Correct.

MR. BAUER: So Exhibit 4A, can we just blow up the top half?

BY MR. BAUER:

Q. This is a chart that you generated based on actual Barnes & Noble sales, right?

A. That's part of what is reflected here, yes, sir.

MR. BAUER: Mr. Berk, if you can just blow up just the 2010 numbers, all the way down through 2010.

Q. So that just shows us there were some sales in December 2009 and then we get into 2010, right?

A. That's correct.

Q. I have done the calculation. Tell me if this is right or you want to verify it. But does it sound right that the 2010 actual Barnes & Noble numbers are 2,098,713?

A. I can take your representation. It will take me a little while to do that.

Q. Is it in the right ballpark? I am happy to add it up. You have looked at annual sales. You have got the numbers.

THE COURT: Come on. This is not the way to proceed.

So looking at it quickly, it appears to be approximately 2 million. Is that the figure you want to use?

MR. BAUER: That's correct, your Honor.

THE COURT: Does that appear to you to be about 2 million?

THE WITNESS: It looks like that would be a rough approximation.

MR. BAUER: Thank you.

Q. This is 2010. This is the 2010 actual. I will give it a little line to show it's an estimate. OK?

A. OK.

Q. You understand that line means estimate, right?

A. Approximate, yes.
Q. And this is actual Barnes & Noble.
Then I just want to get the actual Barnes & Noble numbers through the time of the Amazon agreement.
To the time of the Amazon agreement, are the actual numbers approximately 4 million units?
A. What period of time are you asking me to look at? That doesn't look like 4 million to me.
Q. Let me leave it at 2010.
In 2010, in the first year Barnes & Noble was on the marketplace, they had about 40 percent, they gained about 40 percent -- not gained -- they grew to be about 40 percent the size of Barnes & Noble, right?
MR. EDERER: Objection. Foundation.
A. I'm sorry. You said grew to 40 percent of Barnes & Noble. That didn't make sense.
Q. Let me ask the question again.
We have actual Amazon sales 5.3 million, right?
A. Yes.
Q. In 2010, actual Barnes & Noble sales are about 2 million, right?
A. Correct.
Q. In the year 2010, Barnes & Noble was about 40 percent the size of Amazon?
A. 2 million is a little bit less than 40 percent of 5.3, yes.

Q. So about 40 percent?
A. A little bit less, but yes.
Q. And that percentage continued up until the day of the Amazon agreement, right? Do you know that?
A. What percentage?
Q. For 2011, up until November 2011, so January 2011 to November 2011, Barnes & Noble continued to be about 40 percent of the size of Amazon?
A. I don't believe that's accurate, no.
Q. Let me show you, please, DTX 787.

Do you have a book of exhibits in front of you?

We haven't given you the exhibits yet.

MR. BAUER: Your Honor, I have a book for you.

Q. Do you have DTX 787?

MR. EDERER: Objection, your Honor. Hearsay. Foundation.

THE COURT: I don't hear him offering it yet.

A. I see that exhibit.
Q. DTX 787 is a document you cited in your report, correct?
A. As I sit here right now, I don't have a specific recollection, but it's possible.
Q. Do you want to take a look at your footnote 164 of your report?
A. This appears to be a document that I considered in connection with my report.

Q. Not just considered, cited for the accuracy of the numbers. You relied on the numbers in this document, correct?

A. I don't recall what I relied on it for. I would have to look at it again.

Q. Look at paragraph 58 of your report.

In your report you stated, "Amazon was an established leader in the e-reader market with a reported market share of more than 50 percent," right?

A. Right. I cite to a different document and then I also cite to this document.

Q. That's right.

MR. BAUER: Your Honor, I offer Defendants' Exhibit 787. It comes off their list. I think they waive any objection to it.

MR. EDERER: Objection, your Honor. Hearsay.

THE COURT: Let me see your report.

What was the page again?

MR. BAUER: Page 34, your Honor, paragraph 158.

We can get you your own copy of the report. Right in the middle of the report there is 164 as a footnote.

THE COURT: I see it.

MR. BAUER: I have an extra copy. I can give it to the witness.

THE COURT: Yes, please.

Sustained.

BY MR. BAUER:

Q. Sir, you relied on this document in forming your opinions, right?

A. As we just discussed, I cited this document in connection with a particular statement in my report.

Q. And the statement you cited it for was that the Kindle's market share was 51.7 percent, right?

A. I think --

THE COURT: The actual statement in his report, give me that page again.

MR. BAUER: I was reading the sentence from the document that he used to generate it.

THE COURT: I'm sorry.

Go ahead then.

MR. EDERER: Objection. Hearsay.

THE COURT: Give me again the page of the report.

MR. BAUER: Page 34.

THE COURT: The relevant sentence of the report, which itself is hearsay but hearsay that's been waived, reads: "The market conditions surrounding the Amazon agreement were significantly different than comparative market information that was available at the time of the hypothetical negotiation. For example, at the time of the Amazon agreement, Amazon's Kindle e-readers had been on the market for over four years and Amazon was an established leader in the e-reader market with a

reported market share of more than 50 percent." And the footnote then cites to several sources, articles.

So the objection is sustained.

BY MR. BAUER:

Q. The document you relied on was a Web site?

A. Are you talking about this document? It's an article.

Q. It was an article that you found on the Web?

A. It's very likely that it was found on the Internet.

Q. I don't need to deal with what the articles are. We are lucky. We have the exact sales figures. Let's get the exact sales figures for the first three quarters of 2011 for Barnes & Noble. I thought that would be the easier way to do it, but we will just get it quickly.

Going to your Barnes Exhibit 4A, and right in the middle, from January 2011, let's take it through September 2011. Those are the first three quarters, right?

A. OK.

Q. Just ballpark for me what you think those sales are for the first three quarters, actual sales for Barnes & Noble.

MR. EDERER: Objection, your Honor.

May we approach?

THE COURT: You may approach, but I don't see anything objectionable in the question just put. If there is some other issue you can approach.

MR. EDERER: There is some other issue.

THE COURT: Come up.

(At the sidebar)

THE COURT: Before we get to your issue, just to elaborate on the last ruling. The mere fact that the defense lists an exhibit doesn't mean that they waive all objections to it if used for some other purpose or offer it for some other purpose after they haven't offered it by the defense.

In the case of this particular article, the expert was citing it for the fact that Amazon had been reported -- and the newspaper article itself indicates it wasn't reported like in an SEC filing or anything like that, it was reported from another hearsay nongovernmental source -- to have more than 50 percent of the market. That doesn't remotely open the door to plaintiffs relying on that article to show that what the article -- again, in total double hearsay form -- reports about Nook sales for that same period is something that this expert is vouching for, let alone that it's admissible in evidence. So that was the reason I sustained the objection.

Now, what is the new problem?

MR. EDERER: I would like to take this one step further, your Honor. Because what is going on here now is that Mr. Bauer is attempting to create for the jury in a prejudicial way the false inference that they should take the $12.5 million that was paid by Amazon, which related to a 300 patent portfolio, and they should simply take the difference between

whatever the percentage of the market Amazon had and whatever percentage of the market Barnes & Noble had, do a quick math calculation, and $6 million. This is going back to what Professor Magee was exactly doing and why he was excluded. This is where this is all leading.

THE COURT: I don't think so. At least he hasn't done that yet. I think he is, at a minimum, attempting to show that some of the assumptions that underlay the witness's treatment of the Amazon settlement were arguably misplaced. So, for example, he showed right before the lunch break that Barnes & Noble would have had very different motivations or a greater degree of motivation than Amazon would to have entered into that agreement. That was maybe right, maybe wrong, but that was a fair argument to bring to the jury's attention. And now I think he is on the way to bring to their attention another possibility.

So I am going to allow this. This is without prejudice to any objections you want to make about his summation, if he is going to say what you think he is going to say, but I don't know that yet.

MR. BAUER: Your Honor, the witness has said that the Amazon agreement is the single best market value. I am going to ask him that if Barnes & Noble had 40 percent of the market on that day, why wouldn't he have valued the agreement at $5 million?

THE COURT: I think that is a fair argument as impeaching his methodology. That doesn't mean that you should be able to argue to the jury on summation that that's what it should be. Those are two different issues.

MR. BAUER: OK. Thank you.

(Continued on next page)

(In open court)

BY MR. BAUER:

Q. Mr. Barnes, I have a calculator. I can put it on the elmo and we can add them up. I am just trying to get ballpark numbers. Can you give me your best estimate eyeballing what the Barnes & Noble actual sales were through the third quarter of 2011?

A. Just ballparking, it looks like it's maybe slightly under 2 million on sales.

Q. That's through Q3?

A. That's through, according to this table, January through September of 2011.

Q. 2 million. All right. About 2 million.

And of course after Q3, Christmas, that's when most sales -- can we go back to that?

I just want to look at those sales just so we can see what happens at Christmas. Sales really spike in November and December. And that's typical in the industry in everything you have seen, right?

A. That is correct.

Q. The sales, on the average, they look 100, 200,000 a month. Then all of a sudden November people start buying Christmas presents?

A. The fourth quarter in this market is typically by far and away where the bulk of the sales are made.

Q. In fact, it's Thanksgiving, it's Black Friday, right, it's the second half of November?
A. I don't have it nailed down to that point, but you might be right.
Q. So through the third quarter gets us right on the eve of the Amazon/ADREA settlement agreement, right?
A. At the end of September we are, I guess, a month and a half before the settlement agreement between ADREA and Amazon.
Q. You had actual Amazon numbers -- Amazon now, go back to my chart -- actual Amazon numbers for the first three quarters, right?
A. I had them for the whole year.
Q. Actual Amazon numbers for the whole year of 2011? You didn't use those, did you?
THE COURT: There are two questions.
MR. BAUER: Sorry.
A. From Amazon's own records I had part-year estimates for the year. And then I had from a third party market research company, I had estimates for the full year.
Q. So estimates. You had estimates from Amazon for 2011, not actual numbers?
MR. EDERER: Objection. It mischaracterizes the testimony.
A. They are estimated actuals.
Q. Sir, the document you're referring to is a document from

January 2011 that was predicting the 2011 sales?
A. I'm not familiar with what document you're talking about.
Q. What document are you talking about?
A. I was talking about two different documents.
Q. Right.
THE COURT: We really need to move this along.
The first document you were referring to, what was that?
THE WITNESS: There were actual Amazon records that had estimated sales for 2011 that ranged between 18 million and 24 million units.
THE COURT: These were actual sales or just actual Amazon records that estimated sales.
THE WITNESS: It was part-year data that estimated for the full year. It was what they called their operating plan.
THE COURT: Did it show actual sales for the first part of the year?
THE WITNESS: It may have, your Honor. I don't recall that.
BY MR. BAUER:
Q. Sir, can you look at Defense Exhibit 296?
A. OK.
Q. Is that the document you're referring to?
A. Yes. This is the document I was just speaking of.
Q. Look at the date on it, sir, at the bottom. Is that

January 25, 2011?

A. There is a date there of January 25, 2011. I don't know what that date represents.

Q. So you don't know what the date is on this document?

You're looking at a column that talks about predictions, right?

A. There's two columns. One that is operating plan one, and it says operating plan one final. And then operating plan two, and then operating plan two 2011 actuals.

MR. EDERER: Objection. This document is not in evidence.

THE COURT: Sustained.

Q. Sir, the document that you say gave you actuals is dated January 25, 2011, correct?

MR. EDERER: Objection. It's not what he testified.

THE COURT: It's a question.

Let me see the document.

I am glad this is not in evidence because only with the aid of a magnifying glass can I actually read it.

MR. BAUER: If I can, every page has that date. The first page is the smallest. If you turn to page 2.

THE COURT: This is the document that you relied on that you were just referring to in your answers to counsel in the last few minutes, yes?

THE WITNESS: It's one of two documents.

THE COURT: Then we focused in on this one, right?

THE WITNESS: Yes, your Honor.

THE COURT: Do you have any reason to believe that the date that appears at the bottom is anything other than the date that this document was created?

THE WITNESS: The only reason why that would surprise me is there are, I think, three different operating plan estimates for 2011. It would strike me as odd that in 25 days of a year they would have gone through three different iterations. But other than that, I don't have any reason one way or the other to ascribe what the meaning of that date is.

THE COURT: All right. Go ahead, counsel.

MR. BAUER: Thank you.

BY MR. BAUER:

Q. Now, did you look to see Amazon's relative market share after three quarters compared to Barnes & Noble in 2011?

A. I wasn't trying to slice it quite that thin. I looked at the overall sales.

Q. Sir, you're trying to value the Amazon/ADREA agreement and apply it to Barnes & Noble, right?

A. Part of the process that I went through is studying the economic terms of the Amazon/ADREA agreement.

Q. And you had quarterly numbers for Amazon and Barnes & Noble through the third quarter of 2011, right?

A. That would have been data that would have been available

for Amazon, yes.

Q. Now, sir, you could have, as part of your methodology, assuming it was still 40 percent in that third quarter -- we saw it was 40 percent in 2010. Assuming it was 40 percent in the third quarter, you could have just taken that $12 million number and taken 40 percent of it, which is $5 million, and figured that to be the fair market value for Barnes & Noble as of that date, correct?

MR. EDERER: Objection, your Honor.

THE COURT: Overruled.

A. No, I would not do that. I would disagree with that.

Q. You don't think it would be fair -- we are talking about the book of wisdom -- -that the day Amazon and ADREA signed that agreement, that Barnes & Noble couldn't have walked in and gotten a deal for 40 percent of the Amazon agreement?

MR. EDERER: Same objection.

THE COURT: Same ruling.

A. I don't know why either party would have approached it that way. That doesn't make any sense to me.

THE COURT: And the Court will ask then: Why is that?

THE WITNESS: Well, again, if we are -- the Amazon agreement, certain economic terms went into the agreement pre-Amazon/ADREA. There were certain expectations. That's clear. I looked at ADREA's own files as to how they were negotiating that license with Amazon. They were clearly

expecting significant growth in Amazon sales, and that was part of their argument to Amazon for why Amazon should pay that royalty, that license. And I think you have to -- this idea of cutting something off at the third quarter of 2011, ignoring what the parties expected or anticipate at that time, I don't believe that's appropriate. That's not appropriate from a valuation perspective.

Q. What I am trying to understand, sir, is if this is the best agreement, and can you convert it to Barnes & Noble, what was different between Barnes & Noble on the day that ADREA and Amazon signed the agreement?

That's going to be the question, but it's not a question.

MR. EDERER: Objection. Just speeches being made. It's argumentative.

THE COURT: I agree. Sustained.

Q. By the way, the Kindle Fire came out after the Amazon agreement, correct, was released after?

A. I am not sure specifically when it was released. I know that it was being heavily promoted and it had made significant inroads in the press.

Q. Sir, you're talking about expectations. You didn't look to see how successful the Kindle Fire had been at the time of the ADREA agreement?

A. I was looking at the expectations. The expectations were

that it was going to be a significant new product.
Q. And at the same time, within the same week, Barnes & Noble was introducing a new product and there were similar expectations for it?
MR. EDERER: Objection. No foundation.
A. There were --
THE COURT: Hold on.
Sustained.
Q. Sir, do you know whether at the same time that Amazon was introducing the Kindle, and that you believe there were significant expectations, do you believe that there were also significant expectations for the Barnes & Noble Nook?
A. At that time, I believe sales had already begun to significantly drop off for the Nook.
Q. Did you not look to see whether Barnes & Noble was introducing a new product?
A. Barnes & Noble introduced a number of new products over the years. I don't recall the specific -- I don't recall the specific dates of those introductions.
Q. Sir, is it your suggestion -- strike that.
As part of your project here, you went out and you searched the Web and looked for news releases and public press and things like that to see what people were saying about the Amazon product, right, to figure out expectations?
A. It depends on what you're referring to, but one of the

analyses that I did was to investigate what information, what expectations might have been available that would have informed ADREA and Amazon when they entered into that agreement as to expectations for sales of Amazon products.

Q. Are you telling us that you didn't go to look at the same type of information regarding Barnes & Noble and expectations for it at the same time in November 2011?

A. With respect to Barnes & Noble, I was focused on looking at what the expectations were when they introduced the first Nook product at the end of 2009.

Q. You didn't look at 2011.

Let me ask, sir --

MR. EDERER: Objection.

Q. Is it your belief --

MR. EDERER: Objection.

THE COURT: Objection to what? He hasn't finished the question.

Q. Let me look at the Georgia-Pacific factors. Let's see where there are differences between Barnes & Noble and Amazon in November 2011, because you have said that's the starting agreement.

MR. EDERER: Objection. Your Honor. That's not what he testified to.

THE COURT: I think what counsel needs to do is just limit himself to questions and not make statements as part of

the question. So rephrase the question.

MR. BAUER: Yes, your Honor.

Q. We have the Georgia-Pacific factors. This is from your exhibit, right?

A. This looks like the second half of the Georgia-Pacific factors. I don't recall whether this is my exhibit or not.

Q. You don't know whether Barnes & Noble's lawyers gave it to us and told us you were going to testify to this?

MR. EDERER: Objection, your Honor.

THE COURT: Sustained.

Q. Sir, did you participate in preparing this document?

A. I didn't prepare the document. It appears to be the second half of the Georgia-Pacific factors. I'm not quarreling with you on that.

Q. You didn't seem to recognize it and I am surprised.

THE COURT: Counsel.

MR. BAUER: I'm sorry, your Honor. I withdraw that.

Q. Let's look at these factors.

MR. EDERER: May we approach one more time, please? Sorry.

THE COURT: All right.

(Continued on next page)

(At the sidebar)

MR. BAUER: I apologize, your Honor.

MR. EDERER: He is asking the witness to conduct a Georgia-Pacific analysis in 2011 when the Amazon agreement was signed. The witness has clearly testified that he conducted a Georgia-Pacific analysis in 2009 using the Amazon agreement as a starting point. This whole line of questioning is prejudicial and irrelevant because the hypothetical negotiation he is talking about is two years later.

THE COURT: So you seemed to agree earlier or did not seem to be arguing with his starting point, that in determining what the parties would have hypothetically agreed to in 2009 you can look at what occurred thereafter.

I think the law in that area is much more narrow than you're both apparently in agreement that it is, but maybe you can point me to some case law. My understanding, and I haven't looked at this for about a year I guess or more, is that while what happened later can serve as a kind of a check or a kind of corroboration as to what you hypothesize would have been the agreement, that it is not proper to assume that the parties in 2009 actually knew in a Nostradamus fashion what was going to happen in 2011.

MR. EDERER: That's not what the witness testified. He said he was using it as data point, the house analogy that he gave before. It's the only document that shows a fair

market valuation for the license for those. What he did was took that information and he applied back in 2009. He is not saying the parties in 2009 knew anything about it or should have taken it into account. Now we are moving the whole process forward two years.

THE COURT: Until we got to this point, everything I thought defense counsel was doing --

MR. BAUER: Plaintiff's counsel.

THE COURT: Plaintiff's counsel -- was well within the scope of permissible cross-examination. And I can't tell yet where he is going with this part, in part, I have to say, because plaintiff's counsel, whose cross-examination up to now was a model of clear, crisp questioning, seems to have lost that in the last few minutes. But I am going to let him go a little bit more on this and then we will see if we have to strike it or not.

(Continued on next page)

(In open court)

BY MR. BAUER:

Q. All right, Mr. Barnes. What I am trying to get at is the differences that existed in 2011 between Barnes & Noble and Amazon, which would lead you to believe that it wouldn't have been a fair starting point to value the Amazon agreement pro rata to the Barnes & Noble market share. OK?

MR. EDERER: Objection, your Honor. This is what we talked about earlier.

MR. BAUER: May I ask a question?

THE COURT: Let's erase all the statements. Just put a question.

Q. Sir, factor 15, the outcome of the negotiations. We will come back to that.

14, opinion testimony of experts. We will skip that.

So the first one is 13, the portion of realizable profit. That element, it's your view that both companies were in relatively -- Barnes & Noble and Amazon were in relatively similar positions at that time, correct?

MR. EDERER: Objection, your Honor. This reads to the Georgia-Pacific factor.

MR. BAUER: I will withdraw the question, your Honor, and ask it a different way.

Q. You provided an opinion regarding that factor and its impact on the Amazon and Barnes & Noble -- its impact on your

hypothetical negotiation, right?
A. I believe this factor was discussed in my report, yes.
Q. In your report, your view was that that factor was not significantly different between Barnes & Noble and Amazon for purposes of your analysis, right?
A. I believe that what I said in my report is that, in analyzing the conditions and circumstances surrounding Amazon at the time of the hypothetical negotiation -- I'm sorry, Amazon, at the time of the Amazon agreement, as compared to the hypothetical negotiation in 2009 that would have been between Barnes & Noble and Philips on the one hand and Discovery on the other, that there was not a meaningful distinction there. I think that's a little bit different than what you articulated.
Q. Factor 12, a portion of profit or selling price customarily allowed for the use of the invention."

It's your view that there is little difference between Barnes & Noble and Amazon with respect to that factor in doing your analysis, correct?

MR. EDERER: Objection, your Honor. No foundation.

THE COURT: Overruled.

A. Again, my analysis of that factor, which I describe in my report, would have been an analysis of the circumstances surrounding the Amazon agreement in 2011 versus what would have been associated with the hypothetical negotiation. I believe with respect to that factor, I believe that my conclusions -- I

concluded that the Amazon agreement itself took into account what information there was on how much of the portion of the profit or selling price might be allowed for the use of the invention.

(Continued on next page)

Q. You found no meaningful distinction between Amazon and Barnes & Noble on that factor?
A. For purposes of carrying the associated royalty terms back to 2009, I believe that's correct.
Q. Factor 11, "The extent to which the infringer has made use of the invention and the value of such use." With respect to that, you made no adjustments between Amazon and Barnes & Noble, correct?
A. I don't believe I made any adjustments. I think I discussed this factor in my report. There's a significant distinction between Amazon in 2011 versus Barnes & Noble in 2009.
Q. What about between Amazon and Barnes & Noble in 2011?
MR. EDERER: Objection, your Honor, same objection.
A. I don't believe that's a relevant -- I'm sorry.
THE COURT: Overruled.
A. I don't believe that's a relevant comparison. That's not the comparison I did.
Q. Number 10, "The nature of the patented inventions, character of the commercial embodiment, etc.," as you wrote here. Any differences between Barnes & Noble in 2011 and Amazon in 2011 with respect to that?
MR. EDERER: Same objection.
THE COURT: You will have a continuing objection to this, so you don't need to stand up. I'm overruling it. We

can discuss it further at the break. I am, though, going to limit. How much more do you have on cross?

MR. BAUER: Half an hour, your Honor.

THE COURT: All right. Then, counsel, come to the side bar.

(At the side bar)

THE COURT: You told me before lunch, when we broke for lunch, you had an hour more. You have already gone an hour. I probably should not have told you that I wasn't going to ask you to sum up today, because otherwise you would have been -- we have to finish the evidence today. We must complete the evidence today.

MR. BAUER: Yes, your Honor.

THE COURT: We know we have 38 minutes of the videotape. That won't change. If we go much further on this, forget about any rebuttal from Mr. Wang.

MR. BAUER: Your Honor, what time will we be breaking today for the break?

THE COURT: Why don't you see if you can do it in 15 minutes.

MR. BAUER: I will move to my last module, your Honor.

THE COURT: Very good.

(Continued on next page)

(In open court)

MR. BAUER: We will perhaps come back to that. But let's look at how you calculated -- how you converted this agreement rather than applying a lump sum prorated share. OK? What you did, sir, first, is you used estimated sales. What you wanted to do was get Amazon sales for six years out, right?

A. I wanted to get what I believed to have been the reasonable expectations of the parties for Amazon's sales when they entered into that agreement.

Q. You didn't ask counsel to get you the actual Amazon sales for 2011, right? You just estimated?

MR. EDERER: Objection.

THE COURT: There are two questions there.

Q. Sir, for 2011 you estimated Amazon sales?

A. I didn't personally estimate them. I obtained estimates of actual sales from a third-party market research firm and I compared those to internal Amazon estimates.

Q. So you decided to use third-party data rather than Amazon's data for 2011?

A. I considered both.

Q. But you chose to use third-party data?

MR. EDERER: Objection, your Honor. He hadn't completed his answer.

THE COURT: No, I think he was not being responsive. Put the question again.

Q. For 2011 you chose third-party data rather than Amazon data for your analysis?
A. The point estimate I used was based on third-party data that I confirmed with Amazon's estimates.
Q. It was greater than Amazon's estimates, right?
A. No, that's not true.
Q. The estimates you say were between 18 and 24 million?
A. Correct.
Q. You didn't choose the 18 million number Amazon was estimating?
A. I utilized the 19 million, which came from the IDC report.
Q. In fact, the document you say you got the number from shows an estimate going from 24 million to 18 million, right?
A. There was a range of between 18 million and 24 million.
Q. Sir, did you read the deposition that that exhibit was attached to?
A. I might have. I don't recall right now.
Q. You know that that exhibit was attached to an Amazon deposition, don't you?
A. I believe it was a deposition exhibit. I don't recall whose deposition it was.
Q. You don't recall whether you read that deposition to understand what those documents were showing?
A. I just don't have a specific recollection as I sit here today.

Q. So you don't know as you sit here today that that wasn't showing that Amazon already was predicting a drop from 24 million to 18 million units?
A. I don't have a specific recollection of that, no.
Q. What you did take is you went to this place called IDC, right, and you got their estimate?
A. I obtained the information from IDC. I didn't go to anyplace.
Q. IDC, you put in a number 19.6 million, that was your estimate?
A. That's correct.
Q. Did you test that estimate from IDC? Strike that. IDC is a third-market company that doesn't ask Amazon for the numbers. It goes and asks customers and stores so that they can try to get the information independently, right?
MR. EDERER: Objection.
THE COURT: Overruled.
A. IDC is a market research firm. They have their sources and they do their research and they put out their estimates.
Q. Did you test the IDC estimate against actual Amazon sales to see if it was accurate or not? Not Amazon predictions but actual Amazon sales.
A. I didn't have actual Amazon sales for 2011.
Q. You had the IDC data for 2010, correct?
A. I had actual Amazon sales for 2010. I didn't need the IDC

data for 2010.

Q. You also had the IDC data for 2010, correct?

A. I believe I had access to the IDC data for 2010. It wasn't relevant to my -- it wasn't needed, because I had actual Amazon data.

Q. Sir, you said you had actual Amazon 2011 data also, right?

MR. EDERER: Objection, your Honor.

THE COURT: Overruled.

A. What I said is I had estimates that Amazon had prepared partial year, and that's what I used to confirm the reasonableness of the estimates from IDC.

Q. Let's look at the IDC estimates you had for 2010. That's in Exhibit PTX-224.

MR. EDERER: Objection, your Honor. This document has not been entered into evidence. Actually, this document is not even on plaintiff's exhibit list.

MR. BAUER: Your Honor, it was --

THE COURT: Excuse me. Number one, for cross-examination it doesn't have to be on anyone's interest list. Number to, it hasn't been offered yet. I think the objection is premature. Put a question. You have five minutes left.

Q. Sir, look at PTX-224.

A. I'm there.

Q. That comes from the same database that you had and that you took the 2011 numbers from, correct?

A. I believe that is correct.
Q. The 2010 IDC numbers show how many sales for Amazon --
THE COURT: Now you are referring to a document not in evidence. Now the objection kicks in.
Q. Sir, this is the database you used to generate the 2011 numbers, correct?
A. I didn't use 2010 from IDC.
Q. This is the database you used to create the 2011 numbers, correct?
THE COURT: I think that can be answered yes or no.
A. The data source, I believe the data source, IDC, contains this information for 2010 as well.
Q. Right. You didn't look at that 2010 data to test the 2011 data?
A. No, I did not.
Q. You could have compared the IDC data to the 2010 actual to see if it was greater or less, right?
A. That comparison could have been made.
Q. If the IDC data was 15 percent greater, then you would have some reason to believe that the 2011 data might also have been 15 percent greater, correct?
A. I don't think I would reach that conclusion based on just that comparison. I had other information to consider for 2011.
Q. Let's look at what you actually did. That same database gave you 2012 data, right?

A. I believe 2012 data was included as well.
Q. You didn't use that in your projections for 2012, did you?
A. I did not, because that would have not been available to the parties when they entered into that agreement.
Q. Sir, let's look at what you did put in. For the next few years, you put in for 2012 -- sir, let me show you what's been marked PTX-401?
MR. EDERER: Objection, your Honor.
Q. Sir, this is DX-1014. This is your projections for the future, right?
A. This table has information for actual and then the projections as well.
Q. Right. You put in 21 million for the first year, 23 million, 26 million, 28 million, 31 million, right?
A. Those look to be the right numbers, yes.
Q. The projections that you put in at the time you did that, you had the IDC actual data for 2012, right?
A. That information was available. But, as I discussed on direct, it wasn't relevant to my analysis.
Q. Sir, what was the IDC report for 2012 for the data sales that year?
MR. EDERER: Objection.
THE COURT: Ground?
MR. EDERER: He is trying to get the information that is in the document in through question and answer.

THE COURT: I understand that.

Did you consider that or not?

THE WITNESS: I did not, sir, your Honor.

THE COURT: Why not?

THE WITNESS: Because what actually occurred in 2012 was not relevant to my consideration of what the parties would have anticipated in 2011 when they entered into that agreement. What I was focused on was trying to put myself in the position of Amazon and ADREA in 2011 when they actually entered into that agreement, and I had information as to what the expectations of the parties were at that time and what information would have been available to them at that time.

THE COURT: All right.

Q. What was the total number of sales that you estimated until 2016 for Amazon? 158 million?

A. That includes --

MR. EDERER: Objection.

THE COURT: Ground?

MR. EDERER: That is not estimating. That includes actuals.

MR. BAUER: I'm sorry.

Q. What did you estimate for the next five years? 20, 40, 60, 80, about 120 million, something like that?

A. It looks like roughly 120 million, yes.

Q. Do you have any idea what Amazon's actual sales have been

over that same period of time or up till now?

MR. EDERER: Same objection, your Honor.

THE COURT: I think that is a permissible question. Overruled.

A. I believe, yes, I answered that question on direct. I understand that at least for 2012 and 2013 the sales are quite -- lower than the expectations.

Q. What numbers do you believe those are when you say quite below?

A. I don't have them committed to memory.

Q. We are not asking exact. You said quite below. What do you consider quite below?

A. I think the reported information for 2012 was in the neighborhood of 15 million.

Q. How about for 2013?

A. My recollection is it was around 11 million.

Q. How about so far for 2014?

A. I'm not aware of that information.

Q. Still going down, though, you know that, right?

A. I don't know that.

Q. Sir, you're talking about expectations in November 2011. It is your view that the Amazon management was so far off that they thought that sales were going to keep going up 10 percent or 20 percent a year when the very next month they dropped?

MR. EDERER: Objection: No foundation.

THE COURT: The objection is sustained on the grounds of argumentative. I have a feeling that was probably the last question.

MR. BAUER: Yes, your Honor.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. EDERER:

Q. Mr. Barnes, on your direct examination I asked you some questions about the per-unit royalty calculation that you had performed and the dollar amount of royalties that you had calculated with respect to the three patents-in-suit coming out of the hypothetical negotiation. Do you recall that?

A. I do.

Q. Could we put up the previous slide, please. This was the slide we looked at at that time, correct?

A. I believe you are correct, yes.

Q. I believe you testified that this calculation covers the period December 1, 2009 to June 30, 2014, right?

A. That's correct with the caveat that we discussed about the '851 patent.

Q. Did you do any other calculation with respect to the anticipated royalties that would be paid by Barnes & Noble in the hypothetical negotiation for a different period of time?

MR. CABRAL: Objection, your Honor. Could we approach?

THE COURT: No. And there is going to be no more side bars. This redirect is going to be finished in the next ten minutes. And we are going to finish the evidence in this case today. That is not a projection. That is an order.

MR. CABRAL: Thank you, your Honor.

THE COURT: Sit down. Ten minutes, counsel.

MR. EDERER: Thank you, your Honor.

A. Yes, I did another calculation similar to this that would have the damages period beginning March 29, 2012.

Q. Is this the calculation that you did, Mr. Barnes?

A. Yes, sir, it is.

Q. This is the second calculation, right?

A. Yes, sir.

Q. Can you explain what we are looking at here.

A. Yes. These are all the rates that we discussed earlier. None of that has changed. All I have done here is I have applied the rates to only those sales beginning with March 29, 2012. I understand that for legal reasons. But this is the calculation that would reflect the total damages if damages began on March 29, 2012, and go through June 30, 2014.

Q. That is broken down between the three different patents, right?

A. Yes, it is, the '851 and '501 together and then the '3 individually.

Q. The number for the '851 hasn't changed from the previous

calculation, right?
A. That's right, because the '851, even under the previous calculation, the damage period for the '851 was limited to March 29, 2012, to December 9, 2012, the same 8½-month period.
Q. This calculation was done using the same royalty rates that you had applied to your other calculation, right?
A. The exact same royalty rates.
Q. What is the total amount for the three different patents based upon this calculation starting from March 29, 2012, for the three of them?
A. It's approximately $405,000.
Q. Is it your opinion, sir, that that is the maximum amount of damages that ADREA would be entitled to should it demonstrate that all three patents-in-suit have been infringed and are valid using March 29, 2012, as a starting point?
A. That is correct.
Q. Mr. Barnes, you were asked some questions on direct examination about the potential for Barnes & Noble to be, I think the word that was used was desperate going into the hypothetical negotiation because they had spent lots of money leading up to that point and would really, really need that license. Do you recall that?
A. I recall the questions, yes.
Q. Isn't it the case that the rules under Georgia-Pacific involve a willing licensor and a willing licensee?

A. That is correct, that is the presumption. Both parties are approaching the hypothetical negotiation, both parties desire a license.

Q. If you applied that reasoning to every negotiation -- you have to assume that the patents are valid and infringed in that hypothetical negotiation, right?

A. That is true.

Q. If you went into negotiation assuming that the prospective licensee is desperate to get that license, wouldn't that skew the negotiation?

A. It could have an impact.

Q. Isn't there another Georgia-Pacific factor that accounts for the possibility that the prospective licensee needs the license more so than it might need the license for something else?

A. The Georgia-Pacific factors cover a wide range of economic circumstances and facts. You would have to be a little more specific.

Q. Georgia-Pacific factor number 9 --

MR. BAUER: I will object to leading.

THE COURT: And I have some question as to whether, although there was no objection, whether the previous set of questions really accurately stated the law. Put a new question.

Q. Are you familiar with Georgia-Pacific factor 9, Mr. Barnes,

the utility and advantages of the patented property over old modes and devices, if any, that have been used for working on similar results?

A. Yes, I am familiar with that Georgia-Pacific factor.

Q. Why, to your understanding, is that factor important?

A. Because one of the considerations at the hypothetical negotiation is what is the benefit that is going to be provided by the use of the patent, patent or patents, over other available alternatives that might have already been used or that might also be available to the party that is taking a license.

Q. If there was another available alternative, perhaps the prospective licensee wouldn't be so desperate for a license, right?

A. That is certainly one consideration if there are ways to avoid using the patent or if there are other opportunities to achieve the same results.

Q. Mr. Bauer asked you some questions about the lump sum calculation that was done or the lump sum payment that was made in the Amazon agreement versus the reasonable royalty calculation that you derived from that. Do you recall that?

A. I do recall that.

Q. In a hypothetical negotiation in 2009, before Barnes & Noble had ever sold a single Nook, do you have an opinion as to whether it would have been more likely for Barnes & Noble to be

looking for a running royalty or for a lump sum?
A. My opinion is that they would have been far more likely to desire a per-unit royalty than a lump sum royalty.
Q. Why is that?
A. Because, again, when you are looking at a company like Barnes & Noble in 2009 that's never sold a product, they don't have any -- they are getting ready to introduce a product -- I don't mean any product -- this particular product, the Nook, they don't know how successful they are going to be. They don't know what type of revenues or profits they might earn. So, they are going to be more likely to desire a royalty arrangement where they can basically pay based on how many they sell as opposed to paying a large amount up front.
Q. Mr. Bauer asked you some questions about comparisons that were drawn between the Amazon agreement in 2011 and what Barnes & Noble would have known in 2011 in a hypothetical negotiation. Do you recall that?
A. I do recall those questions.
Q. Did you conduct a hypothetical negotiation analysis with respect to Barnes & Noble's prospective licensing of the patents-in-suit as of 2011?
A. No. That is not the relevant hypothetical negotiation date.
Q. What is the relevant hypothetical negotiation date?
A. It's late 2009, November 2009.

Q. In November 2009 would Barnes & Noble have had any idea what its market share would have been in 2011?
A. They certainly wouldn't have had specific information on what occurred several years later.
Q. You were asked some questions about your use of Amazon sales numbers. I just want to get this straight. Did you or did you not have actual Amazon sales numbers for 2011?
A. I'm sorry. Repeat the question.
Q. Forget about IDC. Did you or did you not have actual Amazon sales numbers for 2011?
A. Not for the entire year, no.
Q. Isn't it the case that that's why you went and got actual and estimated numbers from IDC?
A. That is correct.
Q. Indicate one more time for the record, if you will, why it is that you didn't use actual or estimated actual sales numbers for 2012 and 2013?
MR. BAUER: Objection.
THE COURT: Sustained.
Q. Was it relevant to your analysis what the actual Amazon sales numbers were for 2012, 2013, and beyond?
MR. BAUER: Objection.
THE COURT: Asked and answered, and that concludes the redirect. Thank you very much. You may step down.
THE WITNESS: Thank you, your Honor.

(Witness excused)

THE COURT: Ladies and gentlemen, we will take a 10-minute break at this time. I am going to try to hold it to 10 minutes. As you can see, we are running behind. We are not going to have summations until first thing tomorrow morning, but we are going to finish the evidence today, I guarantee you that. See you in ten minutes.

(Jury not present)

THE COURT: It is 3:29. At 3:39 we will bring in the jury and begin the tape. It had better be 38 minutes, because if it's 39 the jury will not hear the last minute because we will cut it off.

MR. EDERER: Your Honor, we are prepared to cut one of the two depositions.

THE COURT: That's good.

MR. CABRAL: Your Honor, we may be able to tell you after the break if we intend to call Dr. Wang as well.

THE COURT: All right.

MR. BAUER: We are all tired, your Honor.

THE COURT: That's all fine. Sounds good to me. There anything I can do to make you more tired? We'll see you in ten minutes.

(Recess)

THE COURT: What did the defense decide about the depositions?

MR. EDERER: We are going to play one deposition, your Honor.

THE COURT: Which one?

MR. EDERER: Shawn Ambwani.

MS. ARNI: Before we begin the video, we move the admission of five documents: Defense Exhibit 644, Defense Exhibit 646, Plaintiff's Exhibit 120, Defense Exhibit 55, and Defense Exhibit 272.

THE COURT: Any objection?

MR. BAUER: We don't know what those are, your Honor.

THE COURT: They were the ones referenced in the deposition that both sides --

MR. BAUER: Then there is no objection.

THE COURT: Give me those numbers again.

MS. ARNI: Certainly, your Honor. Defense 644, defense 646, plaintiff 120, defense 55, and defense 272.

THE COURT: Those are all received.

(Plaintiff's Exhibit 120 received in evidence)

(Defendant's Exhibits 55, 272, 644, and 646 received in evidence)

MR. BAUER: As for that Amazon document, the January 11, 2011, document they objected to, we have a stipulation from them. "The parties accept representation that the two Amazon documents are business records of Amazon created and maintained in the ordinary course of business and accordingly agree not to

raise an objection as to the admissibility of the two Amazon documents on hearsay grounds." It's a written stipulation.

THE COURT: What about that?

MR. EDERER: Your Honor, I believe that stipulation has to do with confidentiality issues.

THE COURT: What? That's not what was just read. Can I see the stipulation?

MR. BAUER: We are getting it printed out, your Honor. I have it on the laptop here.

THE COURT: Let's bring in the jury. You can look for it while we are playing the deposition.

MR. BAUER: Thank you.

(Continued on next page)

(Jury present)

MR. BAUER: Your Honor, I have that document.

THE COURT: While I am considering this, you wanted to play the deposition, counsel for the defense?

MS. ARNI: Yes, your Honor. We are calling Shawn Ambwani by video deposition.

THE COURT: Spell his name for the record.

MS. ARNI: Shawn, S-H-A-W-N, last name Ambwani, A-M-B-W-A-N-I.

THE COURT: Go ahead.

(Video deposition of Shawn Ambwani shown)

MS. ARNI: Your Honor, the last the document that was referred to in the video is Defendant's 203. We would like to move that for admission.

THE COURT: Yes, received.

(Defendant's Exhibit 203 received in evidence)

THE COURT: First, is there anything further from the defense?

MR. EDERER: No, your Honor.

THE COURT: Anything further from the plaintiff other than the relating to the stipulation that we will take up at the side bar?

MR. CABRAL: Regarding witnesses, your Honor, we are prepared to call Dr. Wang.

THE COURT: Are you calling him or not?

MR. CABRAL: We are, your Honor.

THE COURT: Bring him in.

MR. CABRAL: Your Honor, your intention is to release --

THE COURT: My intention is to go until we finish. I guaranteed the jury it is going to be before 5 o'clock. You told me this was going to be a very short witness. I'll give you 15 minutes on direct.

MR. CABRAL: That was all I was going to ask for, your Honor. Thank you.

THE COURT: Counsel, come to the side bar.

(Continued on next page)

((at the side bar)

THE COURT: The plaintiff's counsel has furnished me with a stipulation signed by both sides dated October 3, 2014, that in relevant part states in paragraph 4, "The parties accept Amazon's representation that the two Amazon documents are business records of Amazon, created and maintained in the ordinary course of business activities of Amazon, and accordingly agrees," spelled here A-G-R-E-E-S, showing that the parties don't understand grammar, "and accordingly agrees not to raise an objection as to the admissibility of the two Amazon documents on hearsay grounds, nor will it object to the admissibility of the summary documents on hearsay grounds with respect to the Amazon data from the two Amazon documents."

In light of all that, what are the documents that were objected to on hearsay grounds that you wish to put in?

MR. BAUER: It was Defense Exhibit 296, your Honor, just the one.

THE COURT: Any objection?

MS. SHIN: We have no objection to the plaintiff moving these documents into evidence. We had represented to Amazon, who was very concerned about these documents coming into evidence, that we would not be the ones to introduce them. They made the representation to us that ADREA should not have produced these documents to us in the first place under some confidentiality agreement that they had in another litigation.

THE COURT: I don't care about any of that.

MS. SHIN: We have no objection. If ADREA would like to move them in, we have no objection.

THE COURT: They were previously attempted to be moved in, this particular document, and there was a hearsay objection, which I sustained. Now, based on the stipulation, I reverse myself and that will be received. 296?

MR. BAUER: Yes, your Honor. Just for the record, it is a highly confidential Amazon document which we had spoken about, so it can go to the jury but it would be somehow kept from the public record.

MS. SHIN: That was the purpose of this exercise.

THE COURT: Just so everyone understands, at the close of the case the originals of all exhibits go into the custody of the parties who offered them in evidence. This one is funny because it is marked as a defense document, it is going to called a defense document, but plaintiff is offering it. I don't care one whit about that.

What I care about is that when the jury returns their verdict, both sides will send someone down to the courthouse within 24 hours who will be given their original documents, the exhibits, and they maintain them in custody forever after.

Given that, there is no basis for believing that anyone will ever see this, though if there is ever an application for these documents by anyone, the Court will of

course consider it de novo at that time and give them an opportunity to be heard. So, we don't even have the problem we were talking about earlier of things being up on certain screens and not on other screens, and so forth.

296 is received. Even though it is offered by plaintiff, it is marked as Defendant's 296, so we will call it Defendant's 296.

MS. SHIN: As long as the record is clear that it is the plaintiff that introduced the document.

THE COURT: Yes. As far as I'm concerned, the stipulation would have enabled both sides to have offered it regardless of whatever private deals you may have with Amazon, which are of no business of the Court.

(Continued on next page)

(In open court)

(Defendant's Exhibit 296 received in evidence)

XIN WANG,

called as a witness by the plaintiff,

having been duly sworn, testified as follows:

THE CLERK: State your name and spell it slowly for the record.

THE WITNESS: My name is Xin Wang, X-I-N, W-A-N-G.

DIRECT EXAMINATION

BY MR. CABRAL:

Q. Good afternoon, Dr. Wang. What is your educational background?

A. I have a Ph.D in applied mathematics from the University of Southern California at Los Angeles. I also have Master and Bachelor degrees in computer science from Tsinghua University in Beijing.

Q. What do you do for a living?

A. I'm currently the head of micromedia systems of copper research of Huawei, which is currently the largest manufacturer of telecommunications equipment in the world.

Q. What are you are job responsibilities currently?

A. I'm responsible for companywide strategy and solutions of digital rights management and micromedia content distribution for a number of product lines.

Q. We are going to be very quick today, so I'm only going to

ask you a few more questions about your background and then one or two more questions about specific documents. OK?

A. OK.

Q. Do you have any experience with electronic books?

A. Yes. I participated standard development for electronic books.

Q. Specifically, what was your participation in the development of standards for electronic books?

A. I wrote the portions of the standard: Encryption, rights management, and digital signatures.

Q. That's for what standard?

A. That is the standard for EPUB format that is currently used by a lot of ebooks.

Q. What time frame was this?

A. That was year thousand? Year 2000, I'm sorry.

Q. That would have been a long time ago.

A. Yes.

Q. My last question, last two questions on background. Are you the inventor on any patents?

A. Yes. I'm an inventor of --

MR. BERTA: Objection: Relevance.

THE COURT: I will allow it.

Q. Go ahead.

A. I'm an inventor of over 50 U.S. patents.

Q. What do those patents relate to?

A. Most of them relate to digital rights management for digital content, distribution, and protection.

Q. That's it for the background. We are going to jump to a few basic questions about your role in this case, and THEN we are going to get into the substance. OK?

A. OK.

Q. You provided some opinions in this case, is that right?

A. Yes.

Q. Your opinions specifically are in response to Dr. Neuman, is that right?

A. Yes.

Q. Is it correct that your opinions relate to the issue of validity of the patents at issue in this case?

A. Yes.

Q. Can you tell the jury what type of analysis you did with respect to the validity issues.

A. I looked at an analysis of the three patents in this case and their file histories. I looked at all the references cited by in Dr. Neuman's report, and also I reviewed Dr. Neuman's report and his deposition testimony.

Q. I want to talk about one of the documents referenced in Dr. Neuman's report. OK?

A. OK.

Q. This document is Defendant's Exhibit 411, which has been previously admitted.

MR. CABRAL: Your Honor, we are going to put it on the screen. If you like, we have a binder here. But it should be pretty straightforward.

THE COURT: The screen is fine. Go ahead.

MR. CABRAL: Thank you.

Q. As part of your analysis, you considered this document marked as Defendant's Exhibit 411, is that right?

A. Let me change my glasses.

MR. BERTA: Objection, your Honor. Move to preclude testimony on anything other than the '851 patent with respect to security and encryption pursuant the hearing we had last week.

THE COURT: I hate to do this, but I think we need a side bar, because I really don't understand your objection.

(Continued on next page)

(At the side bar)

MR. BERTA: I apologize, your Honor. You asked the question, and the question was asked three times at the Daubert hearing, what is his expertise. His expertise is in the security and protection of distributing digital content. The only patent related to that is the '851 patent, not the '501, which has to do with the lending period, and certainly not the '703, which has to do with --

THE COURT: Did he opine on these in his report?

MR. BERTA: He did.

MR. CABRAL: There has been no challenge to his qualifications to this point, your Honor, to opine on the '501 patent.

MR. BERTA: He admitted three times in --

THE COURT: Let me see.

MR. BERTA: This is the transcript of the hearing.

THE COURT: This was in response to a question of what expertise he was adding. This was in the context of his reliance on Professor Magee and the meshing of their two areas of expertise. It was not with respect to what's being asked now.

MR. BERTA: Thank you, your Honor.

(Continued on next page)

(In open court)

Q. You have considered this document as part of your analysis in this case, correct?

A. Yes.

Q. Have you formed opinions as to whether this document marked as Defendant's Exhibit 411, also known as the Saigh patent, discloses each element of claims 7, 8, 9, 18, and 19 of the '501 patent?

A. Yes, I have.

Q. What are your opinions?

A. My opinion is this patent does not describe each and every element of the '501 patent.

MR. CABRAL: Can we bring up claim 7 of the '501 patent.

Q. I want to direct your attention to storing an electronic book on a viewer and highlight that element, if we can. Dr. Wang, did you form an opinion as to whether the Saigh patent discloses storing an electronic book on a viewer?

A. Yes.

Q. What is your opinion?

A. The Saigh patent does not describe storing electronic book on a viewer.

Q. What is the basis for that opinion?

A. Because the Saigh patent describes storing electronic books on separate memory modules or separate compact cylinders.

Q. What is a compact cylinder?
A. A compact cylinder is a storage media, like a CD.
Q. What is a memory module?
A. A memory module is another type of storage media, like a cartridge.
Q. You mentioned that the memory modules and compact cylinders were separate. What did you mean by that?
A. Saigh describes many times in his patent those two are separate from the control unit and also separate from the entire apparatus.
Q. What do you mean by control unit?
A. The control unit is the one that reads information from the memory module or compact cylinder that displays the information.
Q. That's where you view the electronic books?
A. Yes.
Q. I want to direct your attention to the next element here, "associating a predetermined amount of time after the electronic book is stored on the viewer with the electronic book." Did you form any opinion as to whether the Saigh patent discloses that element?
A. Yes.
Q. What is that opinion?
A. The Saigh patent does not describe this element.
Q. What is the basis for that opinion?

A. Because Saigh patent only describes two types of information, two pieces of types of information. One is the time at which the electronic book is read into the separate memory module. Another piece of information is a set time period after which the information on the separate memory module would be erased. Those two pieces of information are related to storage of the books on the memory module, are not related to storage of the book on the viewer.

Q. One last question about this before we move on to the last document we will talk about today. Where in Saigh, in the Saigh patent, is the predetermined amount of time associated, if at all?

A. It is associated to the book when the book is written to the separate module at a book bank facility.

Q. What is a book bank facility?

A. A book bank facility is geographically located somewhere else that can be used to distribute books.

Q. The last document I'll talk to you about -- I just have a few questions, and we will try to wrap up within three or four minutes -- is the Bolas patent marked Defense Exhibit 477. You reviewed the Bolas patent as part of your analysis in this case, correct?

A. Yes.

Q. Did you form any opinions as to whether the Bolas patent renders claim 13 of the '703 patent invalid?

A. Yes.

Q. What is your opinion?

A. The Bolas patent does not teach the claim 13 of the '701 patent.

MR. CABRAL: Can we bring up claim 13.

(Continued on next page)

Q. I want to direct your attention in the middle clause beginning with "enabling," there is the phrase "initiate sending a request with the identifier representative of a type of the consumer appliance."

Are you familiar with Dr. Neuman's opinions on this element?

A. Yes.

Q. What does he point to to, in his view, meet this element?

A. He thinks the serial number that he used for the device is the identifier.

Q. Do you agree with that opinion?

A. No.

Q. Why not?

A. Because the serial number is not a representative of a type of consumer appliance.

MR. CABRAL: If you can zoom out a little bit, I just want to focus on the last issue here before I sit down.

Q. The element beginning "based on the identifier." Do you see that?

A. Yes.

Q. It reads: "Based on the identifier the server initiating access to a Web page with content information about a context of using the consumer appliance." Do you see that?

A. Yes.

Q. Are you familiar with Dr. Neuman's opinions on this

element?
A. Yes.
Q. Do you agree with Dr. Neuman's opinions?
A. No.
Q. What is your opinion as to whether the Bolas patent discloses initiating access to a Web page with content information based on the identifier?
A. The Bolas patent has a description on how the Bolas system works. In the description, Bolas has a pseudo code that describes how the system server receives the input from a request and then direct the input to radio station. So in that pseudo code it clearly shows that the serial number is not used at all; it does not appear in that pseudo code at all.
Q. The last line of questions I am going to ask you about is the phrase "content information about a context of using the consumer appliance." Do you see that?
A. Yes.
Q. In the context of the Bolas patent, which relates to a radio device, what is your understanding of what Dr. Neuman points to for that element?
A. He points to the returned radio station data.
Q. Do you agree with his opinion that that returned radio station data constitutes content information about a context of using the consumer appliance?
A. No.

Q. Why not?
A. Because that's the data for usage of the radio. It's not the information for the context of the usage of the radio.
Q. What would be information about the context of using a radio in your opinion?
A. It could be some recommended station of the radio station that the user can turn to.
MR. CABRAL: No further questions, your Honor.
THE COURT: Cross-examination.
CROSS-EXAMINATION
BY MR. BERTA:
Q. Dr. Wang.
A. Yes.
Q. We are on a schedule.
I think you mentioned earlier that you had done some work with e-books in the 2000s, is that right?
A. Yes.
Q. And a little bit before that you may have mentioned you did a little bit of work related to encryption and DRM when you were at Xerox or IBM?
A. Xerox.
Q. It's true, though, prior to being hired by ADREA in this case, you never heard of these patents at all, is that true?
A. That's right.
Q. But you did know Dr. Neuman prior to this case?

A. Yes.
Q. It's fair to say that you hold him in high regard professionally?
MR. CABRAL: Objection, your Honor.
THE COURT: Ground.
MR. CABRAL: Relevance.
THE COURT: Overruled.
A. Yes. He is a professor, researcher.
Q. In preparing your reports in this case, did you speak to anyone else other than the attorneys for ADREA?
A. No.
Q. Did you talk to Mr. Berg?
A. No.
Q. You don't have an opinion here, obviously, with respect to whether or not the Nook devices infringe, is that correct?
A. That's correct.
Q. You didn't review the Nook devices, is that correct?
A. That's correct.
Q. And you have never actually had any experience with any Nook devices, is that correct?
A. I don't know what devices are involved.
Q. But you do agree that with respect to invalidity on the one hand and infringement on the other hand you have to apply the claims in the same manner in both analyses, is that true?
MR. CABRAL: Objection, your Honor. Relevance.

THE COURT: I agree it's irrelevant. It's also a question of law, but is there any disagreement on that proposition?

MR. CABRAL: No, your Honor.

THE COURT: OK. So the jury now knows, when you're doing your work tomorrow and you're looking at particular words of a claim, they don't change their meaning if you're looking at it for one purpose and then looking at it for another purpose, their meaning is constant throughout, whatever meaning you tend to ascribe to it.

Put another question.

BY MR. BERTA:

Q. My question is, in preparing your report in this matter, did you take any action to review Mr. Berg's work to determine whether or not you and he were applying the claims consistently in either of your opinions?

A. No, I didn't.

Q. Is it correct that you're not actually offering an opinion of validity of the patents, correct?

A. I'm offering my opinion on validity of those three patents in response to the issues or opinions that were raised by Dr. Neuman in his report.

Q. So is it fair to say that you're basically responding to what you understood Dr. Neuman's opinions to be?

A. My opinions are limited to responding to his opinions.

Q. A couple of questions. One of the patents that you looked at here is the '851 patent, is that right?
A. Yes.
Q. I know you didn't talk about it in your direct, but I did have a couple of questions for you.
You provided an opinion regarding the Sachs' Softbook of the '851 patent?
A. Yes.
Q. You agree that the Sachs' Softbook patent is prior art in claim 96 at least of the '851 patent?
A. Just looking at the filing date it appears so.
Q. Now, you also looked at the S-HTTP specification for purposes of this case, is that right?
A. Yes.
Q. The Secure Hypertext Transfer Protocol specification?
A. Yes.
Q. Can I call it secure HTTP, is that OK?
A. That's OK.
Q. You don't dispute that secure HTTP is prior art to claim 96 of the '851 patent?
A. Just look at the publication dates, yes.
Q. Do you have an opinion as to whether or not someone who had knowledge of the Softbook patent, the Sachs patent, would have had a motivation to combine that invention with secure HTTP?
MR. CABRAL: Objection, your Honor. Defense counsel's

expert did not address this issue.

THE COURT: Sustained.

Q. One of the things that you talked about here was Saigh, is that right, today?

A. That's for a different patent.

Q. I know. We did cover Saigh on direct, correct?

A. Yes.

Q. You offered two opinions. You offered the opinion as to whether or not Saigh discloses the element --

MR. BERTA: Can I have claim 7?

Q. You had two opinions. One, a response to Dr. Neuman on whether or not storing an electronic book on a viewer, whether or not Saigh discloses that, is that right?

A. Right.

Q. Let's take that one first.

Now, you at least agree that the control unit of Saigh is a viewer, is that right?

A. It could be a viewer, but not the viewer in the sense of the patent.

MR. BERTA: Can I have his deposition, please?

THE COURT: Counsel, bear in mind your examination is going to end in ten minutes.

MR. BERTA: I am aware, your Honor.

Can I hand this up to you?

Your Honor, page 240, lines 21 to 25.

THE COURT: 240, what lines?

MR. BERTA: Lines 21 to 25, hopefully.

THE COURT: Any objection?

MR. CABRAL: No, your Honor.

THE COURT: OK.

BY MR. BERTA:

"Q. So the control unit is what is labeled 20, correct?

"A. That's right.

"Q. And in your opinion that is a viewer?

"A. That's right."

MR. BERTA: Can I have the picture out of Saigh that is on the front page?

Q. So 20, that's that little guy up in the left, is that right?

A. Yes.

Q. You do agree with me that if the entire picture that I have just shown you right there can be considered a viewer, then you agree it definitely stores electronic books, correct?

MR. CABRAL: Objection, your Honor. Foundation.

THE COURT: Overruled.

A. No, I don't think the entire thing is considered to be a viewer.

Q. Which is not my question. My question is, if the entire thing can be considered a viewer, you definitely agree that within that picture there are stored electronic books, correct?

MR. CABRAL: Objection. Lack of foundation.

THE COURT: Sustained.

Q. You agree within that picture there are stored electronic books, correct?

A. The books are stored in those separate modules and the separate compact cylinders labeled as 22 and 24.

Q. So you agree that number 22, they can hold electronic books, correct?

A. Yes. That's a separate memory module.

Q. If we can go to -- well, let me just ask you the question.

You're aware that there is a disclosure in Saigh that the memory cards 22 can be inserted into what you say is the viewer, number 20, correct?

A. Yes.

Q. When the cards are inserted into the viewer, you agree that then the viewer has electronic books on the card in the viewer at least, correct?

A. Yes. It is connected to the control unit, but it still does not describe it stores the e-books on the viewer.

Q. So take a camera and take an SD card. An SD card inside a camera, you would contend that whatever is on that SD card is not in that camera, is that correct?

A. Right.

Q. And that is the basis for your opinion that it is not stored on the device, that even though it's in a piece of

memory that is intended to and inserted into that device, that does not mean that it is in fact stored on the device, correct?

A. That's one of the reasons.

Q. But you do agree that it would be obvious to have memory on board number 20 in which to store electronic books, correct?

MR. CABRAL: Objection. Defense counsel's expert did not render an opinion on obviousness.

THE COURT: Sustained.

Q. The other distinction between Saigh and claim 7 in the '501 patent is on this step of associating a predetermined amount of time after the electronic book is stored on the viewer with the electronic book, correct?

A. Yes.

Q. As you know, the Court has instructed that this means a step of associating with the electronic book for a predetermined amount of time that begins when the electronic book is stored on the viewer, correct?

A. That's right.

Q. Now, in your opinion -- well, there is a section of Saigh that both you and Dr. Neuman point to that has language regarding the time period that is set for the borrower of the electronic books, correct?

A. Yes.

Q. You agree that Saigh says, "Information downloaded from a compact cylinder or from a book bank to a memory module 22,"

and that's the little card, right?

A. Yes.

Q. "May also include date and time information as to when the data was transcribed into the memory module as well as information regarding a set time period after which the information transcribed in the memory module will be automatically erased." Correct?

A. Yes.

Q. Now, one of your opinions with respect to this disclosure is that this sentence does not state that the preset time period begins when an electronic book is stored on the viewer, right?

A. That's right.

Q. So to be clear, you believe that if the preset time began before the book was downloaded to the memory module and then stored in the viewer, that is different than claim 7 under the Court's construction, correct?

A. Could you repeat that question?

Q. Possibly. To be clear -- well, let me start over.

It's true that your problem with this disclosure is that it doesn't say that, the preset time period begins when the electronic book is stored on the viewer?

A. A little bit more than that. It does not say a predetermined amount of the time that begins.

MR. BERTA: Paragraph 481, the second sentence.

THE COURT: Paragraph?

MR. BERTA: 481.

THE COURT: But who's counting.

So you want to read that?

MR. BERTA: The second sentence.

THE COURT: Any objection?

MR. CABRAL: It doesn't appear to be impeachment.

THE COURT: Sustained.

Q. So let me ask you the question differently.

You agree that one of the differences between Saigh and claim 7 is that Saigh does not state that the preset time period begins when an electronic book is stored on the viewer, correct?

A. Saigh does not describe a predetermined amount of the time that begins, which is construed by the Court.

Q. Which includes a predetermined amount of time when the electronic book is stored on the viewer, correct?

A. Yes.

Q. So to be clear, it is your opinion that if the preset time period began before the book was downloaded to the memory module, which is what would happen if the book was downloaded to the memory module from the book bank, that's different than claim 7 under the Court's construction, correct?

MR. CABRAL: Objection, your Honor. Foundation.

THE COURT: Well, also compound, assumes facts not in

evidence, and states the opinion of counsel. Sustained on all of those grounds.

Q. You mentioned a book bank in your direct, is that correct?

A. I'm sorry. Are you asking me a question?

Q. I am. I would not ask the judge a question.

A. Sorry.

Q. You mentioned a book bank in your direct?

A. Yes.

Q. And the book bank is where the book bank can put a book on the little card 22, correct?

A. That's right.

Q. And associate a predetermined time with that card, is that correct?

A. Yes.

Q. But your opinion is because the card is not yet in the viewer, that can't meet claim 7, correct?

A. That's part of it, yes.

Q. So that if the time period was set before the card got into the viewer, you believe that that does not fall within the scope of claim 7 by the Court's construction, is that correct?

A. It's not associated with the book stored on the viewer. It's only associated with the book is stored on the separate memory module.

Q. The card hasn't made its way to the viewer yet, correct?

A. That's correct.

THE COURT: Counsel, your time is up, but because I am well-known for my generous forgiving ways, I will give you two more minutes if you have one last thing you want to cover.

MR. BERTA: Thank you, your Honor.

Q. We talked a little bit about Bolas?

A. Yes.

Q. Bolas is a little Internet radio, correct?

A. That's right.

Q. And Bolas has -- I think we agree what it sends to a URL is the user identification information?

A. Yes.

Q. Then it also sends a serial number for the particular device, is that correct?

A. That's correct.

Q. So just to be clear, is it your opinion that if the only thing the device sends is user information and the particular serial number of the particular device itself, that that does not meet the claim elements of the identifier that is associated with the type of appliance?

MR. CABRAL: Objection, your Honor. Foundation. Assumes facts not in evidence. That opinion was not in defense counsel's expert.

THE COURT: Sustained.

MR. BERTA: I have no further questions.

THE COURT: Any redirect?

MR. CABRAL: No, your Honor.

THE COURT: Thank you very much. You may step down.

THE WITNESS: Thank you, your Honor.

(Witness excused)

THE COURT: Anything else from plaintiff?

MR. BAUER: I just ask that you let the jury know about Exhibit DX 296.

THE COURT: Yes, 296 was received.

MR. BAUER: Thank you.

THE COURT: But all of the exhibits will be given to you when you start your deliberations.

So it's been a full day. Let me just quickly remind you of a few things. When the case is given to you tomorrow, which it will be given after the closing arguments of counsel and my instructions, you will basically have to consider up to three things.

The first thing you will need to consider is whether there has been an infringement of any of the claims in any of the patents. If there is no infringement, that's the end of that. If there is an infringement, the next thing you will have to consider is whether as to any claim that you found that was infringed, that claim is nevertheless invalid either because it didn't describe something new or because what it described would have been obvious to anyone skilled in the art.

If you find that any given claim is invalid, that's

the end of that. If, however, you find any claim was infringed and that the claim is valid, then you will go on to determine damages, the amount of money that needs to be awarded. And that requires you to determine what a reasonable licensor in the position of the plaintiff would have negotiated in November 2009 with a reasonable seller, reasonable licensee.

You heard some testimony today and even before today about things that occurred after 2009. Those things can be relevant by sort of backward reasoning. You can say, well, if Joe agreed to buy a widget from Tom in 2010 for ten bucks, that reasonably he might have paid him ten bucks in 2009, or you might disagree, that conditions have changed totally by 2010. You can't backward reason. All of that is for you to decide.

I do want to make clear that ultimately what you have to decide is what someone in 2009 would have decided was the fair royalty, the fair price for licensing any patent that you find was infringed, not what someone decided later on; you can't substitute the later stuff for the earlier, but you can use it to reason backwards to determine what you think the conditions would have been.

So those are the possible jobs that you will have to undertake tomorrow. I will give you very full instructions on all of this.

Now, tomorrow plaintiff's counsel goes first. They get an hour. Defense counsel goes second. They get an hour.

I go last. I only get a half an hour but it's enough.

So we will start at 9. You say, boy, this is the guy who cried wolf. My gosh, I am going to make every effort to start at 9 tomorrow. So if we start at 9, we will go directly through those two hours of summation, take a 15-minute break and then give my half hour of instructions. So I am guessing about 11:45 the case will be yours to start deliberation.

You can take as long or as little as you want for deliberations, but on the assumption that it might take you more than an hour, we are going to arrange for lunch to be brought in to you at around 1:00 and we will give you a menu during that mid morning break so you can order your lunch.

So I think that's everything. I am glad to say it's still only two minutes before 5, but I think it's time for you to go home.

Thank you so much.

We will see you tomorrow at 9:00.

(Jury exits courtroom)

(Continued on next page)

THE COURT: Any motions that anyone wants to make?

MR. CABRAL: Yes, your Honor.

Plaintiff would move for a judgment as a matter of law of no anticipation by the Bolas reference in light of Dr. Neuman's concession that there was in fact no anticipation of that reference.

I am happy to move on if you like.

THE COURT: Keep going.

MR. CABRAL: We would also like to move for judgment as a matter of law of no obviousness for claim 96 of the '851 patent in light of the combination of the Sachs and HTTP references, given that Dr. Neuman did not provide a reason to combine the two references and Dr. Neuman conceded that neither reference included receivers that selects the title in the transmitted list of titles.

With regard to the Saigh reference, plaintiff would also move for judgment as a matter of law of no anticipation which is the only defense raised with respect to that reference. In light of Dr. Neuman's concession that the predetermined time period begins after the book is written on the alleged viewer, and in light of the evidence indicating that the memory module is separate from the viewer itself.

Finally, your Honor, plaintiff would move for judgment as a matter of law of no invalidity in light of the Munyan reference, in light of the fact that Dr. Neuman is relying on

security information that does not initiate retrieval of content information to the device itself.

THE COURT: All right.

MR. CABRAL: As a procedural matter, plaintiff would move for judgment as a matter of law with respect to all the defense issues, but we would like to focus on those.

THE COURT: Your general motion which you were right to raise at this point for technical reasons is denied, but now with respect to your more specific motions, let me hear from defense counsel.

MR. SHARIFAHMADIAN: Regarding the Bolas, your Honor, there was no concession that Bolas does not anticipate. Dr. Neuman testified that the claims must be read consistently. And if they are read in the manner that plaintiff is suggesting for purposes of infringement, then there is more than sufficient evidence for a reasonable jury to find that Bolas anticipates those claims and, therefore, judgment as a matter of law is not appropriate.

Regarding the combination of S-HTTP and the software patent with respect to claim 96 of the '851 patent, there is more than sufficient evidence in the record to allow a reasonable jury to conclude that a combination of S-HTTP and SoftBook would have been obvious to a person of ordinary skill in the art.

Saigh, which is the reference that was asserted

against the '501 patent, Dr. Neuman did not concede that the time begins after the book is stored on the viewer. In fact on redirect he clarified his testimony that the time begins when the book is stored on the memory module. And he testified that the memory module is part of the viewer in one embodiment, is part of the viewer at the time that the book is transferred from the compact cylinder to the memory module. So there is more than sufficient evidence for a jury to find that Saigh anticipates.

With respect to Munyan, Dr. Neuman testified that the security identification code is used to initiate retrieval and that retrieval information is based on that code because the bookstore will not return information if that code is not validated, and that is more than sufficient evidence for a jury to find that Munyan anticipates.

I believe I may be missing one, your Honor. I am sorry.

THE COURT: Is there one he hasn't responded to yet of the points you just raised?

MR. CABRAL: I believe he addressed them all.

THE COURT: I agree with defense counsel that there are jury issues here so the motions are denied.

Now let me hear any motions from defense counsel.

MR. SHARIFAHMADIAN: Your Honor, we have a motion with respect to all of the claims.

THE COURT: Yes, that motion is denied.

MR. SHARIFAHMADIAN: I will focus on several issues.

One is with respect to claim 13 of the '703 patent. There is no evidence or no legally sufficient evidentiary basis for a jury to conclude that claim 13 is infringed by Barnes & Noble. That is a method claim. And the only evidence that Mr. Berg or anybody else put into the record here is that the users -- Mr. Berg pointed to the actions of users of Nook devices and what a Nook device does to say that the enabling limitation of claim 13 is met.

However, the law is very clear that a method claim cannot be infringed by selling your product; it is the actions that need to be looked at, not the fact that a product is capable of being used to infringe a method.

There is no evidence of direction and control in this case.

There is no allegation of inducement of infringement -- that your Honor already granted summary judgment with respect to.

The only claim here is direct infringement and he has not pointed to any actions performed by Barnes & Noble. All he pointed to is what a user does and what a Nook device is capable of doing when it is owned and being operated by a user of that device.

Also, with respect to the based on an identifier

limitation of claim 13, all that Mr. Berg pointed to and all that this evidence shows in the record is that identifiers are sent and identifiers may be returned, but nothing in terms of what happens to those identifiers.

And claim 13 specifically says that the identifier is representative of type. Mr. Mulchandani testified, unrebutted, that the identifier that is representative of type and model number is in the HTTP header and is actually not used to return any information; it is used for logging and statistical purposes but not to return any information. For that reason, there is no evidence supporting a judgment of direct infringement with respect to method claim 13.

THE COURT: Anything else?

MR. SHARIFAHMADIAN: Yes, your Honor.

With respect to claim 1 of the '703 patent, Mr. Berg admits that pressing the shop icon is accessing the shop application. That testimony is further corroborated by Mr. Mulchandani and Dr. Neuman's testimony. So the user is accessing the shop application when pressing the button happens.

The evidence in this case is that shop is a Web browser. The evidence shows that it receives and displays HTML. It identifies itself as a browser. It was built using Android Web browser libraries. It can be used to browse and search the shop storefront. You can use it to follow links to

the general worldwide web. That was demonstrated in open court. And it uses the HTTP protocol which is a protocol that transmits over the worldwide web.

This evidence is unrebutted in the record. There is no other evidence for a jury to conclude that shop is not a Web browser, and for that reason we move for a judgment as a matter of law with respect to claim 1 of noninfringement of the '703 patent.

THE COURT: I would like to get the full panoply.

MR. SHARIFAHMADIAN: And I will try and move as fast as I can.

With respect to the '501 patent and claim 7, again, this is a method claim. So selling a product capable of performing the method is not direct infringement. That's *Joy Technologies*. That's federal circuit law.

Here, storing the book on the device, the unrebutted evidence is that that is something that the Nook device does; it's not something that Barnes & Noble is performing. Therefore, there cannot be direct infringement for that reason with respect to claims 7 and 8.

Additionally, with respect to both claims 7 and 18, there is no associating predetermined amount of time that begins when the electronic book is stored on the viewer. The unrebutted evidence is that the time begins prior to when the book is stored on the viewer. Mr. Berg admits that. Mr.

Mulchandani testified as to that. Mr. Neuman testified as to that. The time admittedly sometimes can be short, but nevertheless there is no literal infringement. And there is more than sufficient testimony in the record for a reasonable jury to find that this difference is substantial. Dr. Neuman testified as to that.

Additionally, your Honor, we renew our motion with respect to the fact that doctrine of equivalents is not even applicable here because of the prosecution history.

Finally with respect to claim 96, there is no evidence to allow a jury to find that the receiver in the accused Nook devices is doing the selection of titles. The evidence in the record by Mr. Mulchandani and Dr. Neuman is that it is the user who is the doing the selecting. There was no evidence in the record at this trial to rebut that. All Mr. Berg said is that I saw a bunch of lists being sent to the device and I saw something being returned. He had no evidence or opinion regarding what actually happens in the Nook device with that. Mr. Mulchandani testified that there is no selection of the list by the device, much less the transmitter or the receiver. Therefore, we move for noninfringement on that basis, your Honor.

I think that covers it, your Honor.

THE COURT: Let me hear from plaintiff's counsel.

MR. CABRAL: With respect to claim 13, claim 13 is a

method claim. This is claim 13 of the '703 patent. It is a method claim that requires a method of enabling a service provider to provide a service via the Internet.

Mr. Berg testified at length regarding how each step of that claim is performed and Mr. Berg's testimony is evidence in this case. Now, with respect to other aspects of the actual claim that were challenged by plaintiff, he takes issue with whether or not data is retrieved using the identifier claim in claim 13. That identifier is representative of a type of device. This came up, your Honor, earlier in the proceedings. There is an admission by Barnes & Noble's 30(b)(6) witness and I asked him at his deposition, how does the server decide what data to provide to the device? And that 30(b)(6) witness admitted, the model number. That evidence by itself, your Honor, is sufficient to defeat this judgment as a matter of law.

With respect to claim 1 of the '703 patent, the challenge there -- I apologize, your Honor -- I forget the actual basis for the challenge.

Again, Mr. Berg gave very detailed testimony on an element-by-element basis with respect to claim 1. The issue here that is challenged by defendants is with respect to the initiation of retrieval of data and whether a user has to access a Web browser in order to do that. The testimony of Mr. Berg was clear that pressing the button sends the request.

Mr. Mulchandani also admitted that. Mr. Narain also admitted that as part of his testimony, although it was played by video as part of the designations of law, your Honor.

The issue of the Web browser in our view is a distraction from the issue as to whether the user has to access anything in order to initiate retrieval of data. And on that issue, Mr. Berg provided very clear testimony that the user does not have to access anything.

That takes me to claim 7 of the '501 patent, your Honor. The issue here, as I understand it, is that defense counsel is now arguing that Barnes & Noble performs the storage element of that claim.

I will start with Mr. Berg's testimony which, again, is evidence in the case. He addressed every element of claim 7 and how every step of the method is performed.

You had Mr. Mulchandani's testimony also that the device operates as a slave to the Barnes & Noble cloud which dictates all of the actions that are going on in and around the device which is also evidence in this case to defeat defendants' motion.

With respect to the time period, Mr. Berg testified that in his opinion the time period begins when the book is stored on the viewer. That evidence is sufficient by itself to defeat the motion.

In addition, there is a doctrine of equivalents

argument that your Honor has already allowed plaintiff to make. On this very issue, defense counsel's own expert admitted that a two-to-four-second difference is not substantial. And that, your Honor, is pretty damning evidence, we think, to even get beyond this judgment as a matter of law and to reach the ultimate conclusion in this case.

Finally, your Honor, with respect to claim 96, there is this receiver issue. On this, again, we went through every element here with Mr. Berg. He provided testimony which is evidence in this case regarding how the Nook devices meet that element. He gave testimony specifically that the EAN is the title that is selected by the device. Defense counsel's defense is that the user selects the title -- that's a different subject matter here. And that testimony was corroborated by the testimony of Dr. Neuman earlier this morning regarding the section of the selection of the EAN from a list of EANs as transmitted by the devices.

THE COURT: All right. Once again, I think there are jury questions with respect to each and every one of the points raised by defense counsel so the motions are denied.

Now, in terms of tomorrow, you know the schedule and I really am going to try very hard to get things going promptly at 9:00.

Is there anything else we need to take up this evening?

MR. CABRAL: We have one issue, your Honor.

THE COURT: Yes.

MR. CABRAL: It relates to the sentence we discussed earlier that was the subject of your Honor's ruling regarding patent marking. And not to reconsider your judge's ruling, but to reconsider the accuracy of that language in light of your Honor's ruling on the marking issue.

THE COURT: Go ahead.

MR. CABRAL: Plaintiff believes the law allows it to recover damages prior to the point in time when 271 was triggered which is the subject of your Honor's ruling. So the law is pretty clear and we have three cases and secondary source available here that says that plaintiffs or patent holders are allowed to recover damages prior to the point in time in which 287 is triggered and there is a marking obligation. So, your Honor, prior to the obligation to mark, plaintiff is entitled to damages under the law and after the date of actual notice plaintiff is also allowed to recover damages under the law.

The only issue in this case, in light of your Honor's ruling that there was an obligation to mark products under the '703 and '501 patents, the only period that that affects is that four-month window in between the Amazon license and the date of actual notice in March of 2012.

THE COURT: Let me hear from defense counsel.

MR. SHARIFAHMADIAN: Your Honor, this is an issue of the plaintiff having waived this issue. They have not raised it at any time during this case.

THE COURT: Oh, no, no. The very argument he just made, he has made before. I can remember him making that argument.

MR. SHARIFAHMADIAN: Yesterday for the first time, after your Honor said that anything not raised in jury instructions sent on Friday would be waived and would not be part of the jury instructions.

THE COURT: Last night I got from both sides all sorts of untimely unsolicited communications which of course I was thrilled to receive but I did consider it.

So on the merits, do you have any answer to the point just made?

MR. SHARIFAHMADIAN: If I may have one second?

THE COURT: Yes.

MR. SHARIFAHMADIAN: Our position would be that there is nothing in the language of 287 itself that requires parsing of the time period in this matter. There was an obligation to mark. Your Honor has ruled that it has come into effect and therefore --

THE COURT: I must say, I think 287 is a strange statute.

MR. CABRAL: Plaintiff will offer the cases in the

secondary source if it is helpful.

THE COURT: Here is what I am going to do on this because I am running out of time. I teach at Columbia tonight and I have to hear this other matter.

So you would have it read what?

MR. CABRAL: I will bring up the exact language, your Honor.

It relates to the last sentence, your Honor.

THE COURT: You would say for the '501 and '703 patents, however, damages should run from December 2009 through the date of your verdict except for -- and then we would specify that four-month period?

MR. CABRAL: It would be November 10th of --

THE COURT: How can they even apply that, given the evidence in this case? They don't have the data to separate out that four months.

MR. BAUER: We have no objection to giving them those four months or resubmitting the numbers.

THE COURT: I don't have time. I want both sides to submit by 7:30 tonight -- and I really mean 7:30, not the fake times that I got after 7:30 last night -- to my law clerk what you say that last sentence should say, what case law supports your respective positions -- actually, I take it back, I think it should be the plaintiff who should do this by 7:30 and the defense by 8:00 because the defense has their position stated

in the instruction -- and what evidence would then be added to the record before the jury hears summations tomorrow. So that from plaintiffs by 7:30, response by defendants by 8:00.

My class ends at 8:15 so my law clerk will get that stuff to me and I will give you my ruling by sometime this evening.

Anything else?

MR. CABRAL: No, your Honor.

MR. SHARIFAHMADIAN: No, your Honor.

THE COURT: Very good.

(Adjourned to October 22, 2014, at 9:00 a.m.)

INDEX OF EXAMINATION

PLAINTIFF EXHIBITS

DEFENDANT EXHIBITS